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No. 95-468

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL ENQUIRER, INC., and
BARBARA HANNAH GRUFFERMAN,
Petitioners,

v.

TAMARA HOOD and CHRISTIAN
EDWARD MURPHY by TAMARA HOOD,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTION PRESENTED

Do the First and Fourteenth Amendments permit state privacy laws to impose liability for truthful publication about a public figure on a subject of public interest, if a jury finds that facts published lacked sufficient "social value," or finds that there had been "feasible and effective alternatives" to including those facts?

LIST OF PARTIES

Petitioners in this Court are National Enquirer, Inc. and Barbara Hannah Grufferman. Respondents are Tamara Hood and Christian Edward Murphy by Tamara Hood. In addition, Barbara Moss was a defendant in the Superior Court and respondent in the Court of Appeal. Doug Mays and Martin Dryan were named as defendants in the Superior Court but were never served.

LIST PURSUANT TO RULE 29.1

Petitioner National Enquirer, Inc., a Florida corporation, is a wholly-owned subsidiary of American Media Operations, Inc., a Delaware corporation that is a wholly-owned subsidiary of American Media, Inc., a Delaware corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, entered in this case on March 10, 1995.

OPINIONS BELOW

The ruling of the Superior Court is reproduced at A. 37a, 39a.[1] The opinion of the Court of Appeal is reproduced at A. 1a, and its order denying rehearing at A. 35a. The order of the Supreme Court of California denying review is reproduced at A. 36a. None of the opinions is reported.

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[1] References to "A." are to the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeal was entered March 10, 1995. A. 1a. A timely petition for rehearing was denied March 30, 1995. A. 35a. A timely petition for review was denied by the Supreme Court of California June 21, 1995. A. 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, and Article I, § 1, of the Constitution of California, are reproduced at A. 43a.

STATEMENT

A. The Article.

Eddie Murphy, a prominent film star whose off-screen activities are widely reported in the press, gave an interview in the spring of 1992 to *Essence* magazine in which he publicly denied widespread rumors that he had fathered more than one illegitimate child. As *Essence* reported in the cover story of its June 1992 issue:

> "Published reports to the contrary, Murphy says that Bria is his only child. Asked about rumors of other children and paternity suits, he says: 'I have no other children. Those are [*National*] *Enquirer* babies.'" [2]

Three months later, in September 1992, the *National Enquirer*, petitioner here, published an article which accurately reported that in addition to his daughter Bria, Murphy in fact had also fathered a son named Christian Edward Murphy, by respondent Tamara Hood. Contrary to his statement to the press that he had no children other than his daughter, it reported that Murphy had:

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[2] J. Nelson, *The Taming of Eddie*, Essence, June, 1992, pp. 63, 64 (brackets in original).

—purchased a $376,000 house in Woodland Hills, California for two-year-old Christian Edward Murphy;

—established a "million-dollar" trust fund for the child; and

—initially sent respondent Tamara Hood child-support payments of $2,000 monthly. A. 3 n.2.

B. The Complaint.

Murphy never challenged the article. But the child's mother, Ms. Hood, respondent here, brought suit for herself and her child in the Superior Court of Los Angeles County against the *Enquirer* and its publisher. The complaint did not dispute that the statements published in the article were true. A. 37a. But it alleged that the *Enquirer*'s accurate report constituted an actionable invasion of privacy both under California common law, and under the right of privacy added by voter initiative to Article I, § 1, of the California Constitution.[3] Petitioners defended that the report was privileged because it was true and concerned a subject of public interest, and was protected by the First and Fourteenth Amendments.[4]

C. The Superior Court's Ruling.

The Superior Court held that petitioners had a privilege to publish the article, dismissed the privacy claims, and entered judgment for petitioners. A. 42a. Respondents appealed.

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[3] Besides the two privacy counts, the complaint had three other counts, alleging commercial appropriation, appropriation of name or likeness, and "intrusion upon solitude and into private affairs." See A. 2a. These were dismissed by the Superior Court, A. 38a, and the dismissal was affirmed by the Court of Appeal on state-law grounds. A. 34a. They are not further discussed in this petition.

[4] Petitioners raised their First and Fourteenth Amendment claims in the Superior Court by demurrer to the complaint (pp. 3, 6, 9 n.8); in their brief in the Court of Appeal (pp. 5, 13 and *passim*), and in their petition for review in the Supreme Court of California (pp. 1, 13 and *passim*).

D. The Court of Appeal's Decision.

The Court of Appeal reversed. It rejected petitioners' defense that the right to publish this undisputedly true information was protected as a matter of law by the First and Fourteenth Amendments. California's common-law action for invasion of privacy,[5] the court held, allows a jury to award damages for a true publication if the jury finds that particular facts included in the story are private, offensive, and not "newsworthy." A. 8a. Under California law, the court held "newsworthiness" does not mean a subject of general interest. Rather, it is instead to be determined by a jury using "the following factors which are to be balanced":

> "[1] [T]he social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."

A. 9a, quoting *Kapellas* v. *Kofman*, 1 Cal. 3d 20, 36, 459 P.2d 912, 922 (1969). "When reasonable minds could differ as to newsworthiness, the issue is one for the trier of fact." A. 8a.

The Court of Appeal acknowledged that "the private lives of celebrities and those closely associated with them . . . . are generally newsworthy." A. 12a. It explicitly declined to hold that the basic facts of Murphy's relationship with, and financial support of, respondents were outside the "newsworthiness" privilege. A. 14a.

However, the court held, "even when an event is generally newsworthy, the publication of certain facts may not be such." A. 12a. In this case, "the *details* of plaintiffs' financial affairs were indisputably private facts," A.6a,

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[5] The elements of the California common-law tort of "public disclosure of private facts" are (1) a public disclosure of (2) private facts, the publication of which is (3) highly offensive to a reasonable person and (4) not of legitimate concern to the public. *Forsher* v. *Bugliosi*, 26 Cal. 3d 792, 808-09, 608 P.2d 716, 725 (1980); *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 543, 483 P.2d 34, 44 (1971); see A. 5a.

(emphasis supplied), and by accurately reporting these facts—the price of the house, the amount of child-support payments, and the size of the trust fund—petitioners could not claim First and Fourteenth Amendment protection as a matter of law. A. 13a, 27a. Instead, the court held, a jury, weighing California's three criteria, could decide against the right to publish:

> "[W]e cannot say as a matter of law that the details of a celebrity's financial support of his child and Ms. Hood's are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy."

A. 13a.[6]

The court went on to hold that a provision added by voter initiative to the California Constitution, an additional count of the complaint, could also allow a jury to impose liability for publishing truthful financial facts.[7] Under this constitutional provision, CAL. CONST. Art. I, § 1, the plaintiffs could defeat a defense that the publication was both true and on a subject of public concern, if a jury concluded that "there are feasible and effective

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[6] "The Enquirer contends, '[D]etails such as the level of child support Eddie Murphy was paying, and the price of the house he bought for his son, were a part of the story of his concealing this son from his fiancee.' We think a trier of fact could conclude differently." A. 14a n.6.

[7] The California constitutional privacy tort allows damages on proof of "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Hill* v. *National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 39-40, 865 P.2d 633, 657 (1994); see A. 21a.

alternatives to defendant's conduct which have a lesser impact on privacy interests." A. 23a, quoting *Hill* v. *National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 40, 865 P.2d 633, 657 (1994). Here, the court held, a jury could reasonably conclude that the article's "details" about finances were "unnecessary to the story the tabloid sought to tell." A. 27a. Petitioners' "constitutionally protected interest in publicizing newsworthy information," the court held, was not "of sufficient strength to override plaintiffs' privacy interest as to *all* of the information published." *Id.* (emphasis in original).

Petitioners' timely petition for review was denied by the Supreme Court of California, with Justice Mosk noting his dissent. A. 36a. This petition followed.

REASONS FOR GRANTING THE WRIT

Here a national publication, whose veracity had been directly challenged in the press by a celebrity, published accurate and precise facts that demonstrated that the celebrity was not telling the truth. The California court holds that even on a subject of public interest, A. 12a, 14a, there was no First Amendment right to include truthful financial facts in that story. The publisher may be held liable for its accurate report unless the article as published with those facts is approved by a jury—using such factors as how jurors assess "social value," or whether the jury concludes that there were "feasible and effective alternatives" to including those facts in the story.

The two privacy torts California has established and applied here go so far in creating liability for publishing truthful information, and in conferring jury discretion to impose it, that they cannot be squared with the First Amendment decisions of this Court. They also conflict with recent decisions of federal courts of appeals and state supreme courts that hold, following this Court's decisions, that the First and Fourteenth Amendments do not permit publishers to be held liable for accurately publishing facts germane to topics of public interest. And

they ignore the long-recognized rule that neither courts nor juries may constitutionally act as surrogate editors-in-chief, substituting their own post-publication judgments on how a story should have been written.

Most states tightly restrict their privacy torts by recognizing a broad privilege to publish any accurate facts that are reasonably related to a subject of public discussion. However, California and a few other states have established a much broader and uncertain liability. California makes the right to publish the truth turn on after-the-fact judgments that weigh "social value," or whether there were "feasible and effective alternatives" to publication. Even more remarkably, it leaves those amorphous standards to be applied not by an editor, not by a judge, but by a jury—based upon how any particular jury views, *inter alia*, the "social value" of publishing. Imposing liability for publishing the truth, based on jury applications of such vague and unpredictable tests for the content of speech, violates the First Amendment.

If truthful publication may be restricted at all, this Court has held, it is only when there is "a need to further a state interest of the highest order." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 537 (1989), quoting *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). The privacy interest identified by the California court here—in concealing amounts of payments made by a public figure for an illegitimate child (the circumstances of whose birth the court assumed petitioners were otherwise free to write about, A. 14)—pales in comparison with the far stronger privacy interests—such as a rape victim's identity—this Court has held are constitutionally inadequate to silence the press. Where reporting is truthful, up to now "our decisions have without exception upheld the press' right to publish." *Florida Star* v. *B.J.F.*, *supra*, 491 U.S. at 530; see also, *e.g.*, *Smith* v. *Daily Mail Pub. Co.*, *supra*, 443 U.S. at 103; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975). And articles including financial data of individuals are commonplace. See n. 16, *infra*.

The most populous state and the media center of the country here imposes on a national publication the burden—not of sifting stories to eliminate what may be *false* —but of excising supporting facts that are *true*, if those might later be determined by a jury to have lacked sufficient "social value," or to have been nonessential because of "feasible and effective alternatives." As state and federal courts outside California recognize, such a burden on reporting the truth is simply at war with this Court's First Amendment decisions. This Court's review is called for when a major state establishes vague and open-ended liability for accurate reporting by the national press on a topic of public interest.

I. THIS COURT HAS LONG RECOGNIZED THE IMPORTANCE AND INEVITABILITY OF THIS ISSUE.

As long ago as 1967, this Court pointed out the almost inevitable clash between some state privacy laws and the First Amendment's protection of truthful speech. *Time, Inc.* v. *Hill*, 385 U.S. 374, 383 n.7 (1967). That constitutional issue was long postponed, however, because most state privacy laws contain a sweeping privilege for the reporting of newsworthy events—so broad an exception that this Court noted an open question "whether the claim of privilege is not so overpowering as virtually to swallow the tort." *Id.*, quoting H. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 335-36 (1966). As a result, "[o]ur decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy have not . . . exhaustively considered this conflict." *Florida Star* v. *B.J.F.*, *supra*, 491 U.S. at 530. "The somewhat uncharted state of the law in this area . . . contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line of decisions has produced relatively detailed legal standards governing the multifarious situations in which individuals aggrieved by the dissemi-

nation of damaging untruths seek redress." 491 U.S. at 530 n.5.

From the beginning [8] and in nearly every state, the tort of invasion of privacy by publishing private information has always been confined by a broad privilege to publish accurately facts of interest to the public. See *Time, Inc.* v. *Hill, supra,* 385 U.S. at 383-84 n.7 (citing twenty-two "representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest"). To call the privilege into play, a majority of states simply "requir[es] that a logical nexus exist between the complaining individual and the matter of legitimate public interest." *Campbell* v. *Seabury Press,* 614 F.2d 395, 397 (5th Cir. 1980).

California has adopted two far less cautious laws imposing privacy liability—one by common law, and one by voter constitutional initiative. As commentators point out, California is in the minority of states in imposing such restrictions on truthful publication, and in refusing to apply a privilege to details that are germane to a subject of public interest. California in its common-law tort uses the word "newsworthiness," but then defines that word to mean something totally different: a jury's determination of whether to publish was proper, after weighing factors like "social value." See R. SACK & S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 592-95 (2d ed. 1994). In most jurisdictions, "if the incident being discussed is a matter of general or public interest, the protection covers relevant information about private people involved . . . ." *Id.* at 593. In California, by contrast, "even if the publication is about a matter of clear public interest, publication of private information about a person involved may be prohibited." *Id.* at 592. And by the separate privacy tort added to California's consti-

[8] See S. Warren & L. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 214 (1890).

tution, publishers may be held liable if jurors conclude that there had been "feasible and effective alternatives" to publishing. As a result, California now has squarely presented the issue that was foreshadowed in *Time, Inc.* v. *Hill.*[9]

II. CALIFORNIA'S PRIVACY LAWS ARE IN CONFLICT WITH DECISIONS OF THIS COURT.

A. The Right To Publish May Not Be Left to Subjective Jury Decisions of "Social Value" or Alternative Ways of Reporting.

The First Amendment cannot protect if it is left hostage to the views of particular juries as to the value of publication. To allow the right to publish to turn on jury balances of such concepts as "social value" or "feasible and effective alternatives," as California does, is alien to the First Amendment decisions of this Court.[10]

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[9] The California rule that allows a jury to impose liability for invasion of privacy by examining the "social value" of a news article has been previously challenged in this Court, in *Times Mirror Co.* v. *Doe*, No. 88-287 (OT 1988). The petition for certiorari in that case came before the Conference shortly after this Court had noted probable jurisdiction in *Florida Star* v. *B.J.F.*, see 488 U.S. 887 (1988), and was held for several months without action, apparently awaiting the decision in *Florida Star*. However, a few weeks before the *Florida Star* decision was announced, the *Times Mirror* petition was dismissed by consent of the parties pursuant to this Court's then Rule 53. 489 U.S. 1094 (1989). (The unreviewed *Times Mirror* precedent was relied upon by the Court of Appeal here; see A. 8a, 12a, citing *Times Mirror Co.* v. *Superior Court*, 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556 (1988), *pet'n for cert. dismissed sub nom. Times Mirror Co.* v. *Doe*, 489 U.S. 1094 (1989).)

[10] Many other cases applying California privacy law reiterate its test of "social value." See, *e.g.*, *Briscoe* v. *Reader's Digest Ass'n*, *supra*, 4 Cal. 3d at 541, 483 P.2d at 43 ("A jury could find . . . minimal social value"); *Diaz* v. *Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 135, 188 Cal. Rptr. 762, 773 (1983) (publisher's attempt at humor confirmed low "social utility"); *Times Mirror Co.* v. *Superior Court*, *supra*, 198 Cal. App. 3d at 1429, 244 Cal. Rptr. at 562 ("a

In the first place, whether a particular statement is protected by the First Amendment is a question of law, not to be made dependent on the decisions of individual juries. The California court cited in passing *Connick* v. *Myers*, 461 U.S. 138 (1983). A. 8a n.4. But the court completely ignored the unambiguous direction in that very opinion:

> "The inquiry into the protected status of speech is one of law, not fact."

461 U.S. at 148 n.7. The rule could scarcely be otherwise if the First Amendment is to remain a meaningful protection. This Court has long declined to allow the right to publish or speak to turn on the application of subjective discretionary standards by state officials, whether they be jurors or others. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 536-38 (1981) (Brennan, J., concurring) (collecting cases). And this Court also has left no doubt that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 685 (1989), citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

Besides that, standards like "social value," particularly when they are "balanced," A. 9a, by a jury, are so hopelessly vague and subjective that they violate the First and Fourteenth Amendments for that reason as well. For example, in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), rejecting a claim for intentional infliction of

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jury must consider the social value of publishing Doe's name"); *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 893, 118 Cal. Rptr. 370, 380 (1974) (social lesson of good deed "justifies repetitive recounting"). The court here considered the California rule so clear that it did not designate its opinion for publication. See Calif. Rule of Court 976(b) (opinions may not be published unless they establish a new rule of law, resolve or create a conflict, involve a legal issue of continuing public interest, or make a significant contribution to legal literature).

emotional distress, this Court held that the First Amendment does not allow a publisher's liability to turn on a jury's decision whether an item had been "outrageous":

> " 'Outrageousness' in the area of political and social discourse has *an inherent subjectiveness* about it which *would allow a jury to impose liability on the basis of the jurors' tastes or views,* or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."

485 U.S. at 55 (emphasis supplied). It is irreconcilable with the First Amendment for juries to use amorphous standards to pass judgment, not on the exercise of reasonable care, but rather on the *content* of someone else's speech.

> "A standard of 'relevance,' . . . especially such a standard applied by a jury . . . is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for . . . suppression . . . ."

Monitor Patriot Co. v. *Roy,* 401 U.S. 265, 276-77 (1971), quoted in part in *Bose Corp.* v. *Consumers Union of United States, Inc., supra,* 466 U.S. at 510.[11]

And this Court long ago established that First Amendment protection cannot be made to hinge on judgments as to the "social value" of speech:

> "Though we can see nothing of any possible value to society in [graphic 'true-crime'] magazines, they are as much entitled to the protection of free speech as the best of literature."

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[11] See also *Monitor Patriot Co.* v. *Roy, supra,* 401 U.S. at 275: "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it."

Winters v. *New York*, 333 U.S. 507, 510 (1948). "Social value" or "feasible alternatives" do not have sufficiently ascertainable meaning to be the touchstone for imposing legal liability for speech, under a Constitution that protects against vague and overbroad laws.

> "[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

Smith v. *California*, 361 U.S. 147, 151 (1959).[12]

By rejecting petitioners' First Amendment defense, and ordering petitioners to defend themselves in a trial in which a particular jury would reach its own conclusions as to "social value," and "feasibility" and "effectiveness" of alternatives, the California court has rendered a final decision that denies a defense of First Amendment protection. Just as in *Cox Broadcasting Corp.* v. *Cohn*, *supra*, to "leave unanswered . . . an important question of freedom of the press under the First Amendment . . . could only further harm the operation of a free press." 420 U.S. at 486, quoting *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974); see also, *e.g.*, *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984).

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[12] Even if California did not define "newsworthiness" based on "social value," the concept is one whose meaning even professional journalists debate. See, *e.g.*, J. Iggers, *What Do We Want, Need From Media?*, Minneapolis Star Tribune, Feb. 14, 1994, p. 1E ("[h]onest and impartial journalists often disagree sharply about what is newsworthy"); R. Cohen, *And My Paper's Strange News Judgment*, Washington Post, March 2, 1990, p. A23 ("[w]hat's the news?"). This Court has explicitly rejected the notion that the permissible content of speech can turn on such criteria as "professional standards." *Harte-Hanks Communications, Inc.* v. *Connaughton*, *supra*, 491 U.S. at 666.

B. The California Rule Compels Self-Censorship.

This Court has enforced a "breathing space" under the First Amendment because otherwise the press could be forced into self-censorship, "inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The press in reporting on public figures is spared liability for its good-faith errors because otherwise the press would likely become overly cautious, which would "result in a deterrence of speech which the Constitution makes free." *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767, 777 (1986), quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). A rape victim's name learned from a government report could be published, this Court emphasized, because "if liability were to be imposed, self-censorship would result." *Florida Star* v. *B.J.F.*, *supra*, 491 U.S. at 538. See also *Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 496 (liability for publishing open documents "would invite timidity and self-censorship"); *cf. United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995) (invalidating "ban [that] induces them to curtail their expression").[13]

The very prospect of having to litigate policy and editorial issues like the "social value" of facts in an article, or "feasible alternatives," before a jury in the Superior Court of the County of Los Angeles or elsewhere, becomes itself an enormous inhibition on the press, as this Court has recognized:

> "[T]he possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade

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[13] See also *Star-Telegram* v. *Doe*, 1995 WL 341575 (Tex. 1995) at *4 (Gonzalez, J., concurring) ("I am concerned that blue-penciling of news articles by judges or juries will have a chilling effect on the freedom of the press to determine what is a matter of legitimate public concern").

> another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . ."

Speiser v. *Randall, supra*, 357 U.S. at 526. "[T]he burden and expense of litigating the issue . . . would unduly impinge on the exercise of the constitutional right." *First National Bank* v. *Bellotti*, 435 U.S. 765, 785 n.21 (1978).

The First Amendment prescribes that editorial judgments about what facts should be included in a story are to be made by editors—and not under the threat of later jury verdicts that will second-guess. *Miami Herald Pub. Co.* v. *Tornillo, supra*, 418 U.S. at 258. "*Tornillo* affirmed an essential proposition: The First Amendment protects the editorial independence of the press." *Turner Broadcasting System Inc.* v. *FCC*, 114 S. Ct. 2445, 2464 (1994). See also *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-61 (1976).

C. Imposing Liability for Truthfully Citing Facts and Figures Is Not a "State Interest of the Highest Order."

The California court did not question that Murphy's fathering and support were a legitimate subject of public discussion, A. 14a—indeed, it is one he himself had put in public issue. Nevertheless, it held, a jury could hold the publisher liable for supporting its true story with the exact amounts of payments, and the value of the house. The result is perverse: that the First Amendment protects the publication of broad and conclusory statements, but that liability may be imposed if a publisher includes the facts to back them up. Under the California ruling, had the article reporting the support of respondent Hood's child contained only generalized assertions, it would have been fully protected as a matter of law. But by supporting the conclusion with specific and relevant data, petitioners lost the right to publish, unless approved after the fact by a jury.

From *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), onward, this Court has recognized that the First Amendment intends debate on public topics to be "uninhibited, robust and wide-open." 376 U.S. at 270. The decision here negates that protection. The publisher here had been challenged by name by a public figure who denied he had fathered other children. Providing specifics to demonstrate that the story was true was all the more appropriate. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Hustler Magazine, Inc.* v. *Falwell, supra*, 485 U.S. at 51-52, quoting *Monitor Patriot Co.* v. *Roy, supra*, 401 U.S. at 274. Respondents may not, under the First Amendment, step in to squelch debate with a celebrity on a topic of public interest. "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

This case, after all, is about statements whose truth is undisputed. So highly does the First Amendment value truthful speech that it even "extends a measure of protection to defamatory falsehood," in order more surely to allow reporters and editors to inform the public. *Gertz* v. *Robert Welch, Inc., supra*, 418 U.S. at 342; *New York Times Co. v. Sullivan, supra.*[14] "A rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech related to public figures that does have constitutional

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[14] Some falsehoods are constitutionally protected because otherwise publishers

> "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."

New York Times Co. v. *Sullivan, supra*, 376 U.S. at 279.

value." *Hustler Magazine, Inc.* v. *Falwell, supra,* 485 U.S. at 52. Hence the First Amendment's requirement that publishers have "breathing space." *Id.*, quoting *Philadelphia Newspapers, Inc. v. Hepps, supra,* 475 U.S. at 772, and *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 272. There is no way to reconcile those holdings with the decision here, which holds that if a jury chooses, a publisher may be held liable for truthfully including in a story the price of a house and the size of support payments and a trust fund.

In *Florida Star* v. *B.J.F., supra,* this Court warned that "punishing truthful publication in the name of privacy" is an "extraordinary measure," 491 U.S. at 540, and that the First Amendment permits civil sanctions—"if at all," *id.* at 541, only when "overwhelmingly necessary," *id.* at 537, and "narrowly tailored to a state interest of the highest order," *id.* at 541. "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Pub. Co., supra,* 443 U.S. at 102.[15] This Court indeed has characterized as open the question whether truthful reporting of facts can be made the basis for liability at all. *Florida Star* v. *B.J.F., supra,* 491 U.S. at 541; *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 (1977); *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 491; *Time, Inc.* v. *Hill, supra,* 385 U.S. at 383 n.7.

By contrast, the California laws applied here are the First Amendment in reverse. They require that the "narrow tailoring" and "justifying" be performed by the publisher. It is the publisher which is required to litigate in a jury trial after the fact on whether there were no "feasible and effective alternatives . . . which have a lesser

[15] See also *Butterworth* v. *Smith,* 494 U.S. 624, 634 (1990) ("our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech"); *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 841-42 (1978).

impact on privacy interests." A. 23a, quoting *Hill* v. *National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 40, 865 P.2d 633, 657 (1994). The publisher is left not only "chilled," but with no "breathing space" whatsoever.

Shifting onto the press the responsibility of narrow tailoring not only reads the Constitution backwards. Rather than ensuring that the press "seldom" "if at all" be punished for publishing truthful information, the California standard threatens greater liability when news reports have accurate details. Under the California rule, to include in a truthful story more rather than less information only increases a publisher's peril.

III. THE DECISION CONFLICTS WITH THREE FEDERAL CIRCUITS AND SEVERAL STATE SUPREME COURTS.

The decision conflicts with federal and state decisions that recognize First Amendment protection in such circumstances. As was previously noted, p. 9, *supra*, most states tightly confine privacy torts applied to the press. On the few occasions when state privacy laws have breached usual bounds, federal and state courts have held that to impose liability for publishing accurate reports violates the First Amendment.

Two years ago the Seventh Circuit held that the First Amendment does not permit damages for invasion of privacy by publishing "unnecessary" information about an individual. There a social history of migration patterns included vast detail about the plaintiff's improper claims for public assistance, sexual liaisons, eviction, and many financial difficulties. Affirming summary judgment, the court held that

> "the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal,"

when they include "detail . . . germane to the story that the author wanted to tell." *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232-33 (7th Cir. 1993) (Posner, C.J.). The court also, again applying the First Amendment, emphatically rejected the rule adopted here that a jury should decide whether publication was "necessary." "The publication of books is not at the sufferance of juries." *Id.* at 1234.

The Fifth Circuit last year held the same thing, emphasizing that the First Amendment does not permit a "necessity" standard for accurate reports of the news, and that the judgment of editors as to which relevant facts to include must be very broad. "Perhaps the use of the materials reflected the media's insensitivity, . . . but we are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern." *Cinel* v. *Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994). *Accord, Campbell* v. *Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (all that is required for First Amendment protection of true information is that "a logical nexus exist"). The same rule is well established in the Tenth Circuit. *Gilbert* v. *Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (First Amendment prevents imposing liability for publishing accurate facts except for "the extreme case"). See also *WXYZ, Inc.* v. *Hand*, 658 F.2d 420, 426-27 (6th Cir. 1981) (holding unconstitutional on its face statute authorizing orders to prohibit publishing names of victims of sex offenses).

State supreme courts apply the same First Amendment rule. See *Howard* v. *Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 303 (Ia. 1979) (under First Amendment "the editors also had a right to buttress the force of their evidence by naming names. We do not say it was necessary for them to do so, but we are certain they had a right"); *Romaine* v. *Kallinger*, 109 N.J. 282, 301, 537 A.2d 284, 293-94 (1988) ("it is for the court to determine whether a matter is of legitimate pub-

lic interest" and "once a matter is found to be within the sphere of public interest, otherwise private facts that are related to the subject may also be considered 'newsworthy' and therefore publishable"); see also *Vassiliades* v. *Garfinckel's*, 492 A.2d 580, 589-90 (D.C. 1985) ("the First Amendment . . . protects what otherwise would be an actionable invasion of privacy," citing *Gilbert*, *supra*, and *Campbell*, *supra*, and "no liability exists where a matter of legitimate public interest is concerned").

Many states, sensitive to the First Amendment's protection, have simply revised their common law to conform. For example, three months ago the Supreme Court of Texas, holding it unnecessary to "reach the constitutional issues," emphasized that

> "To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public."

Star-Telegram, Inc. v. *Doe*, 1995 WL 341575 (Tex. 1995), at *4. And the Supreme Court of North Carolina simply judicially abolished that state's invasion-of-privacy tort, to avoid "the existing tensions between the First Amendment and the law of torts." *Hall* v. *Post*, 323 N.C. 259, 265, 372 S.E.2d 711, 715 (1988).

IV. THE ISSUE IS OF NATIONAL IMPORTANCE.

A single state, particularly if that state is California, can remarkably alter the flow of information nationally. Petitioners cannot print a special, more timid edition for California. They also cannot afford repeated litigation in California courts to try to convince a succession of California juries that truthful facts in particular stories were necessary and had "social value" entitling them to be published. Unless reviewed by this Court, the effect of

this and similar decisions will be, for petitioners and for the press nationally, to restrict publication of the truth and limit public discussion nationwide.[16]

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[16] Personal financial information is commonly reported in newspapers and magazines. See, *e.g.*, L. Stepp, *To the Manor Entitled?*, Washington Post, Sept. 7, 1995, p. D5 ("Seven-year-old Jacqueline Cooke . . . recently was granted about $5,000 a month by a Fauquier County court . . . . in California, Nikolai Bonds, 5, and his 4-year-old sister, Shikari, did even better, receiving $10,000 a month each . . . ."); J. Sexton, *Bronx Police Inquiry Depicts a Night Shift Out of Control*, New York Times, May 7, 1995, pp. 1, 38 ("Officer Rivera lives with his wife, Doris, and their two sons, Richard, 5, and James, 3 . . . . The couple bought the three-bedroom town house in 1993, taking out a $122,827 mortgage"); H. Jordan, *Making the Rich Pay: A New Bill Would Set Minimum on Child Support for Wealthy Parents*, Los Angeles Daily Journal, Mar. 17, 1995, pp. 1, 30 ("[Spencer], who earned $1913 a month as a Pacific Gas & Electric Co. employee, sought modification of the child-support order issued when Roberts was making $814,045 per year playing for the San Diego Padres"); J. Kornblum, *Bonds Lawyers Step to Plate for a Pitched Divorce Battle*, San Francisco Examiner, Sept. 17, 1994, p. A-5 (reporting on Barry Bonds' $15,000 monthly payments to Sun Bonds and their two children); C. Anderson, *Mick Confronts Teen Rebellion*, Houston Chronicle, July 22, 1993, p. 10 (describing Mick Jagger's past negotiation of secret "details of 20,000 pound (about $50,000) trust fund to be put in [his illegitimate daughter] Karis's name" and "10,000 pound (roughly $25,000) trust fund once Karis left school"); C. Ramsay, *et al.*, *Born to Spend*, People Weekly, March 20, 1995, pp. 100, 106 (in "Hailey[, Idaho] (pop. 4,000), [Bruce Willis, Demi] Moore and their daughters Rumer, 6, Scout, 3, and Tallulah, 1, live in a $2 million, six-bedroom home"); *id.* at 110 ("Michael J. Fox had a $50,000 pond put in next to his $500,000 home in Cornwall, Conn., so he could fish with his 5-year-old son Sam"); R. Ryon, *Hot Property*, Los Angeles Times, Sept. 12, 1993, pp. K1, K10 ("Satirical novelist T. Coraghessan Boyle . . . . and his wife, who have three children, listed their six-bedroom, Woodland Hills house at $439,000"); *Walter Scott's Personality Parade*, Parade, Apr. 9, 1995, p. 2 ("Howard Marshall II, the 89-year old Texas tycoon, bought $1 million in jewels for his 26-year-old bride 'Playboy' model Anna Nicole Smith," including "a $450,000 necklace with a 12.94-carat pear-shaped diamond pendant; a $250,000 pair of diamond earrings, 7.5 carats

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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September 19, 1995

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each; a $55,000 pair of earrings with 72 baguette diamonds and 194 round diamonds; and a $128,500 bracelet with 120 diamonds").

Forbes magazine prominently devotes an entire issue each year to the 400 wealthiest individuals in America and their families. See, *e.g.*, *Forbes 400*, Forbes, Oct. 17, 1994, p. 134 ("Kathryn McCurry Albertson . . . . very private . . . . believed worth $1.1 billion"); *id.* at 200-01 ("Herbert Allen . . . . highly secretive . . . [s]hared fortune . . . estimated well over $1.2 billion"); *id.* at 260 ("Katsumasa (Roy) Sakioka . . . Costa Mesa, Calif. . . . . maintains extremely low profile . . . . holdings estimated $350 million").

Many more examples could be cited.

APPENDIX

APPENDIX A

NOT TO BE PUBLISHED

[Filed Mar. 10, 1995]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

B082611 (Super. Ct. No. BC088691)

TAMARA HOOD *et al.*,
Plaintiffs and Appellants,

v.

THE NATIONAL ENQUIRER, INC. *et al.*,
Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Kalustian, Judge. Affirmed in part; reversed in part.

Law Offices of Gary L. Bostwick and Gary L. Bostwick, Paul L. Hoffman, and Diane Greene Gordon; Allred, Maroko & Goldberg and Nathan Goldberg, for Plaintiffs and Appellants.

Williams & Connolly and Paul Martin Wolff, Gerson A. Zweifach, Paul K. Dueffert, Thomas G. Hentoff; Irell & Manella and Bruce A. Wessel, Rick Silverman; Law Offices of Jeffrey E. Karpel and Jeffrey E. Karpel, Michael O. Libraty, for Defendants and Respondents.

I. INTRODUCTION

This is an action for privacy invasion and misappropriation brought by two plaintiffs, Christian M., the minor son of actor and comedian Eddie Murphy, and Tamara Hood,

the child's mother. The defendants are: The National Enquirer, Inc. (Enquirer); its publisher, Barbara Marks; and the co-authors of an article about plaintiffs, Doug Mays and Martin Dryan. A fourth defendant, Barbara Moss, allegedly photographed plaintiffs and "subsequently published" the photograph. Each defendant was alleged to have acted as the agent, servant, and employee of her or his codefendants.[1] Five causes of action were separately stated: commercial appropriation (Civ. Code, § 3344) (first); appropriation of name or likeness (second); public disclosure of private facts (third); intrusion upon solitude and into private affairs (fourth); and violation of plaintiffs' constitutional right of privacy (fifth). A judgment of dismissal with prejudice was entered after defendants' demurrers were sustained without leave to amend. We reverse the judgment of dismissal. We conclude it was error to sustain the demurrers to the third and fifth causes of action. We affirm the orders sustaining without leave to amend the demurrers to the first, second, and fourth causes of action.

II. THE COMPLAINT

The complaint alleged as follows. The Enquirer published an article revealing plaintiffs' relationship to Mr. Murphy. The article identified plaintiffs by name. It was accompanied by a photograph of plaintiffs in which they were readily identifiable. The photograph of plaintiffs was appropriated by defendants without any authoriza-

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[1] Plaintiffs argue Ms. Moss "may not hide behind any privilege arguably enjoyed by the media defendants." They cite in their brief numerous facts relating to Ms. Moss which were not alleged in the complaint. Given the allegation that the defendants acted as the agents, servants, and employees of each other, plaintiffs need not at this stage of the proceedings attempt to differentiate the analysis as to Ms. Moss. Insofar as the other defendants are liable on a privacy invasion theory, Ms. Moss would be subject to potential tort liability because it is alleged they are her agents. (*Mary M.* v. *City of Los Angeles* (1991) 54 Cal.3d 202, 208-209; Civ. Code, § 2338; Rest.2d Agency, §§ 212-213, pp. 454-463.)

tion or consent. The misappropriation was accomplished for defendants' pecuniary gain and profit. Photographs of plaintiffs' home and Ms. Hood's car were also published. In addition, the article: "identif[ied] the community in which the residence was located"; and "specifically describ[ed] the residence, . . . the date of purchase and the name on the title . . . ." The article contained specific statements which invaded plaintiffs' privacy.[2] The article said Christian was a " 'love child' " and "was born to [Ms.] Hood out of wedlock." Until the publication of the article, these facts were not known to the general public and plaintiffs desired to keep them private. The disclosure was offensive to a reasonable person of ordinary sensibilities in that it revealed conduct a large

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[2] The statements set forth in an appendix to the complaint were as follows: "And he made the boy a millionaire!"; "And when Tamara found a four-bedroom, three-bath home in Woodland Hills, Calif., it was purchased on March 13, 1992, in Christian's name. The 2,583 square-foot home has a three-car garage, a concrete driveway, a slate tile roof as well as yards in the front and back."; "Eddie also told her to start looking for a house and he would buy it for her and Christian."; "Eddie gives her a generous allowance every month and she's living like a queen. She did over $60,000 of remodeling in her house and bought a new Range Rover that costs about $40,000."; "Eddie started paying her $2,000-a-month support and he paid for the birth of Christian."; "He also set up a million-dollar trust fund for Christian and bought the boy and Tamara a $376,000 house, . . ."; "He did it by setting up a special trust for Christian, said a source."; "He paid for the birth and has supported his love child and the boy's mom for the last two years."; and "She believed Eddie was just being nice to her so she wouldn't make a big deal about his new son to the press." The photograph of the house and car was captioned, " 'Eddie paid for $376,000 home and Tamara's $40,000 Range Rover, insiders say.' "

The Enquirer article itself was not attached as an exhibit to the complaint. Furthermore, a statement in the article to the effect Mr. Murphy offered to pay Ms. Hood a substantial sum of money if she would abort the child was not alleged in the complaint as an invasion of privacy. Therefore, we will not consider the contents of the article not alleged in the complaint.

segment of society may consider immoral. The disclosure also exposed plaintiffs to "unreasonable risk as targets of kidnappers, extortionists, or persons interested in harassment."

As alleged in the complaint, defendants also used Christian's photograph and likeness in a television advertisement for the Enquirer. The advertisement was broadcast throughout the United States. The television advertisement contained a photograph of Christian which had been "doctored so that [Christian's face was] set upon a different body" and "[t]he figure [was] partially animated and moving a portion of his body in the commercial."

III. DISCUSSION

A. Standard of Review

Our Supreme Court has set forth the standard of review on appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend: "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry* v. *Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The judgment of dismissal in the present case was entered after plaintiffs' counsel conceded all relevant facts had been stated and the complaint could not be amended. Therefore, it is presumed the complaint stated as strong a case as was possible. (*Vaughn* v. *Hugo Neu Proler International* (1990) 223 Cal.App.3d 1612, 1616; *Otworth* v. *South-*

ern Pac. Transportation Co. (1985) 166 Cal.App.3d 452, 457.)

B. Public Disclosure of Private Facts

A cause of action for invasion of privacy has been recognized in California since 1931. (*Melvin* v. *Reid* (1931) 112 Cal.App. 285, 291.) Four distinct common law torts fall under the privacy rubric: (1) intrusion into private matters; (2) public disclosure of private facts; (3) false light; and (4) commercial appropriation. (*Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24.) The elements of a cause of action for the second privacy invasion tort of public disclosure of private facts are: (1) public disclosure; (2) of a private facts; (3) which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; and (4) which is not of legitimate public concern.[3] (*Forsher* v. *Bugliosi*, *supra*, 26 Cal.3d at pp. 808-810; *Diaz* v. *Oakland Tribune, Inc.*, *supra*, 139 Cal.App.3d at p. 126; Rest.2d Torts, § 652D, p. 383; 77 C.J.S., Right of Privacy and Publicity, § 24, pp. 518-519.) The first element of the cause of action, public disclosure, is not at issue here.

1. private facts

The second element of the cause of action requires a showing that publicity has been given to matters concerning the private life of the individual. (Rest.2d Torts,

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[3] The fourth element is sometimes discussed as an affirmative defense, i.e., that the published facts were newsworthy and therefore no action will lie, rather than as an element of the cause of action. (See, e.g., *Forsher* v. *Bugliosi* (1980) 26 Cal.3d 792, 808-810; 77 C.J.S., Right of Privacy and Publicity, § 29, pp. 525-527.) However, at trial, the burden is on the plaintiff to prove the publication was not constitutionally protected as newsworthy. (*Diaz* v. *Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 129, 130.) Therefore, it is more accurately described as an element of the cause of action.

§ 652D, com. b, p. 385.) "Private facts" have been described as the "intimate details of one's private life . . . ." (*Wasser* v. *San Diego Union* (1987) 191 Cal.App.3d 1455, 1460.) They are facts which have not been left open to the public eye; or previously made public; and which are not matters of public record. (Rest. 2d Torts § 652D, com. b, pp. 385-386.) The Restatement Second of Torts gives several examples: "Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a [person's] life in [her or] his home, and some of [her or] his past history that [she or] he would rather forget." (Rest.2d Torts, § 652D, com. b, p. 386.)

We find on the record before us that the details of plaintiffs' financial affairs were indisputably private facts. The information: was not left open to the public eye; had not previously made public; nor was it a matter of public record. (Rest.2d Torts, § 652D, com. b, pp. 385-386.) In its brief on appeal, the Enquirer has not contended otherwise. Further, courts in California and other jurisdictions have recognized, in a variety of contexts, that an individual's financial affairs are normally a private matter. (See, e.g., *Adams* v. *Murakami* (1991) 54 Cal.3d 105, 130 (dis. op. of Mosk, J.) [discussing discovery of financial matters in connection with a punitive damages claim]; *Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 19 [client's financial records in attorney's custody]; *Valley Bank of Nevada* v. *Superior Court* (1975) 15 Cal.3d 652, 656 [bank records]; *City of Carmel-by-the-Sea* v. *Young* (1970) 2 Cal.3d 259, 268 [public official financial disclosure law]; *Terry York Imports, Inc.* v. *Department of Motor Vehicles* (1987) 197 Cal.App.3d 307, 318 [automobile dealership records including payroll records and customer credit applications and reports]; *Painting and Drywall Work Preservation Fund* v. *HUD* (D.C. Cir.

1991) 936 F.2d 1300, 1303, and *Hopkins* v. *U.S. Dept. of Housing & Urban Dev.* (2d Cir. 1991) 929 F.2d 81, 87 [release of information about private employees' wages under the Freedom of Information Act]; *Robyn* v. *Phillips Petroleum Co.* (Colo. 1991) 774 F.Supp. 587, 592 [intrusion into private financial matters can form basis for invasion of privacy claim]; *Palmisano* v. *Toth* (R.I. 1993) 624 A.2d 314, 318-319 [punitive damages]; *Tollefson* v. *Price* (Ore. 1967) 430 P.2d 990, 992 [publication regarding debt purportedly owed was an invasion of privacy].) Therefore, we need not address whether other facts published in the Enquirer article were "private facts." (*Aubry* v. *Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967.

2. highly offensive and objectionable to a reasonable person with ordinary sensibilities

The third element of the cause of action requires a showing the disclosure at issue would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. (*Forsher* v. *Bugliosi, supra,* 26 Cal.3d at p. 809; *Diaz* v. *Oakland Tribune, Inc., supra,* 139 Cal. App.3d at p. 126; Rest.2d Torts, § 652D, p. 383; 77 C.J.S., Right of Privacy and Publicity, § 24, pp. 518-519.) According to the Restatement Second of Torts, "It is only when the publicity given . . . is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." (Rest.2d Torts, § 652D, com. c, p. 387.) Defendants contend no highly offensive facts were published. However, the published facts included details of plaintiffs' private financial affairs. Under the circumstances of this case, we cannot say as a matter of law that a reasonable person of ordinary sensibilities would not be highly offended by the publication of such facts.

3. legitimate public concern or "newsworthiness" [4]

With respect to the fourth element, newsworthiness, at a trial, the burden is on a plaintiff to prove the publication was not constitutionally protected as newsworthy. (*Diaz* v. *Oakland Tribune, Inc., supra,* 139 Cal.App.3d at pp. 129, 130.) When reasonable minds could differ as to newsworthiness, the issue is one for the trier of fact. (*Times-Mirror Co.* v. *Superior Court* (1988) 198 Cal. App.3d 1420, 1429; *Diaz* v. *Oakland Tribune, Inc., supra,* 139 Cal.App.3d at pp. 129-130.) On the other hand, when the facts permit only one conclusion, newsworthiness may be decided as a matter of law. (*Kapellas* v. *Kofman* (1969) 1 Cal.3d 20, 39; *Pasadena Star-News* v. *Superior Court* (1988) 203 Cal.App.3d 131, 134.) In the present case, the trial court sustained the demurrers without leave to amend because it found the article was newsworthy.

What is newsworthy is not always clear. As the California Supreme Court recognized in *Briscoe* v. *Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 540, footnote 14: "Judicial attempts at defining what constitutes 'news' are fraught with oversimplification. Thus news has been defined as the 'report of recent occurrences' [citation] or as all factual reports with 'that indefinable quality of interest, which attracts public attention.' [Citation.]" Yet the California Supreme Court in *Briscoe* described the scope of the newsworthiness privilege as extending "to almost all reporting of recent events, even though it involves the publication of a purely private individual's name or likeness." (*Id.* at p. 535.) Further, the *Briscoe* court concluded: "The publisher need not intend to educate the public. 'The line between . . . in-

[4] The United States Supreme Court has recognized that whether the published facts are "of legitimate concern to the public" is a standard used in determining a common law public disclosure claim. (*Connick* v. *Myers* (1983) 461 U.S. 138, 143, fn. 5, citing Rest.2d Torts, § 652D.)

forming and . . . entertaining is too elusive. . . . Everyone is familiar with instances of propaganda through fiction. What is one [person's] amusement, teaches another's doctrine. . . .' [Citation.]" (*Id.* at p. 535, fn. 6.)

In determining whether a publication is newsworthy, the California Supreme Court has identified the following factors which are to be balanced: "[T]he social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. [Citation; fn. omitted.]" (*Kapellas* v. *Kofman*, *supra*, 1 Cal.3d at p. 36.) The California Supreme Court has held: "If the information reported has previously become part of the 'public domain' or the intrustion [*sic*] into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. [Citations.] On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere." (*Ibid.*; fn. omitted.) In addition, the Restatement 2d of Torts states, "Some reasonable proportion is also to be maintained between the event or activity that makes the individual [newsworthy] and the private facts to which publicity is given." (Rest.2d Torts, § 652D, com. h, p. 391.)

Plaintiffs contend a triable controversy exists as to whether the Enquirer article was newsworthy because they are not celebrities or public figures. The complaint alleged plaintiffs' desired to keep the published facts private. Therefore, at the demurrer stage, it must be assumed plaintiffs did not willingly enter into the public sphere. (*Aubry* v. *Tri-City Hospital Dist.*, *supra*, 2 Cal. 4th at pp. 966-967.) However, the law recognizes that individuals are sometimes unwittingly thrust into the public sphere because of: their connection to events which

engender great public interest (e.g., *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.* (1974) (43 Cal.App.3d 880, 892 [janitor found and returned $240,000 in cash]); their close relationship to a candidate for public office (e.g., *Kapellas* v. *Kofman, supra,* 1 Cal.3d at pp. 37-38 [children of candidate for city council]); or their close association with a public figure (e.g., *Maheu* v. *CBS, Inc.* (1988) 201 Cal.App.3d 662, 675 [aide to Howard Hughes]), or a celebrity. (E.g., *Carlisle* v. *Fawcett Publications, Inc.* (1962) 201 Cal.App.2d 733, 747, cited with approval in *Kapellas* v. *Kofman, supra,* 1 Cal.3d at p. 37, fn. 24 [former husband of actress Janet Leigh].) The Court of Appeal stated in *Carlisle*: "[P]eople closely related to such public figures in their activities must also *to some extent* lose their right to the privacy that one unconnected with the famous or notorious would have. If it be objected that the mere relationship with some public figure should not subject a person to *a qualified loss* of [her or] his privacy, the identical observation could be made logically as to the man held up on the street, the householder who is burglarized, or the victim of an accident; all may be equally unwilling to be publicized. [Citations.]" (*Carlisle* v. *Fawcett Publications, Inc., supra,* 201 Cal.App.2d at p. 747; emphasis added.) In *Kapellas* v. *Kofman, supra,* 1 Cal.3d at pages 37-38, footnote 25, a case involving the criminal conduct of the children of a city council candidate, the Supreme Court observed: "Family members, or others closely associated with newsworthy individuals, have been precluded from maintaining actions for invasion of privacy under circumstances in which the societal interest in disclosure was much less compelling than in the instant case. (See, e.g., *Carlisle* v. *Fawcett Publications, Inc., supra,* 201 Cal.App.2d 733 (action by former husband of girl who later became famous movie actress barred); *Estate of Hemingway* v. *Random House, Inc.* (1966) . . . [268 N.Y.S.2d 531] (Sup.Ct.) (suit by Ernest Hemingway's widow dismissed); *Aquino* v. *Bulletin Co.* (1959) . . .

[154 A.2d 422] (suit by parents of girl who was newsworthy because of rapid marriage and divorce barred).)" [5]

The Restatement Second of Torts also recognizes the principle that individuals may involuntarily become newsworthy. The Restatement Second of Torts notes: "There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news.' Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, *and those who are closely associated with them*. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private." (Rest.2d Torts, § 652D, com. f, pp. 389-390; emphasis added.)

Plaintiffs argue: the social value of the facts disclosed was minimal; Ms. Hood's status as an unwed mother,

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[5] The degree to which Ms. Hood's privacy interests were diminished would be greater than those of Christian. This is because Ms. Hood voluntarily entered into a relationship with Mr. Murphy and gave birth to his son. No voluntary conduct on Christian's part led to his relationship to Mr. Murphy. However, under the newsworthiness factors discussed above, and given the facts of this case, the extent to which Ms. Hood willingly entered into the public sphere is a matter for the trier of fact to consider.

"her past romantic involvements," and Christian's illegitimacy, were "of no legitimate public concern"; and "exposing plaintiffs' neighborhood, home and wealth" was of "no social value." Plaintiffs also argue the depth of the intrusion into their private affairs was great in that defendants published unnecessary identifying information. Plaintiffs alleged, and we must accept as true (*Aubry* v. *Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967), that by publishing: their names; photographs of their residence, themselves, their car; a description of their house; a description of the community in which they lived; and the fact they were financially well-off; defendants "exposed both plaintiffs to unreasonable risk as targets of kidnappers, extortionists, or persons interested in harassment." Further, the complaint alleged, "[Ms.] Hood in fact experienced such harassment proximately caused by the disclosure by defendants."

We recognize that the private lives of celebrities and those closely associated with them are matters of interest to large segments of the population. Therefore, they are generally newsworthy. (E.g., *Time Inc.* v. *Sand Creek Partners, L.P.* (1993) 825 F.Supp. 210, 212 [photograph of Lyle Lovett and Julia Roberts on their wedding day]; *Eastwood* v. *Superior Court* (1983) 149 Cal.App.3d 409, 423 [Clint Eastwood's purported romatic involvements with two female celebrities].) However, the courts have repeatedly held that even when an event is generally newsworthy, the publication of certain facts may not be such. (*Gill* v. *Curtis Publishing Co.* (1952) 38 Cal.2d 273, 279 [judgment on the pleadings improperly granted where publication of plaintiffs' photograph in connection with an article was unnecessary]; *Times-Mirror Co.* v. *Superior Court, supra,* 198 Cal.App.3d at p. 1423 [question for trier of fact whether publication of name of witness to unsolved crime was newsworthy]; *Melvin* v. *Reid, supra,* 112 Cal.App. at 292 [demurrer improperly sustained where true name of reformed prostitute published]; *Capra* v. *Thoroughbred Racing Ass'n.* (9th Cir.

1986) 787 F.2d 463, 464-465 [triable issue of fact whether disclosure of identities and location of witnesses in federal witness protection program was newsworthy]. The Restatement Second of Torts states that some reasonable proportion must be maintained between the newsworthy event and the facts published about the individual. (Rest.2d Torts, § 652D, com. h, p. 391.)

In the present case, defendants published, in addition to other information, numerous details of plaintiffs' private financial affairs. (See footnote 2, above.) Plaintiffs were private citizens who never sought to publicize their relationship to Mr. Murphy. They had a right "to be let alone." (*Melvin* v. *Reid, supra,* 112 Cal.App. at p. 289; accord, *Carlisle* v. *Fawcett Publications, Inc., supra,* 201 Cal.App.2d at p. 745, citing Prosser, Privacy, 48 Cal. L.Rev. 383, 389.) They had a privacy interest in precluding dissemination of personal information about them. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal. 4th at p. 35; *White* v. *Davis* (1975) 13 Cal.3d 757, 774-775.) Furthermore, plaintiffs had a constitutionally protected privacy interest in their personal financial affairs. (*Doyle* v. *State Bar, supra,* 32 Cal.3d at p. 19; *Valley Bank of Nevada* v. *Superior Court, supra,* 15 Cal.3d at p. 656.) We cannot say as a matter of law that the qualified loss of privacy resulting from plaintiffs' association with Mr. Murphy, a celebrity, rendered their personal financial affairs newsworthy. Given the assumed facts, we cannot say as a matter of law that the details of a celebrity's financial support of his child and Ms. Hood's are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy. Given the depth of the intrusion into plaintiffs' private financial matters and their attempts to keep their

personal affairs private despite their relationship to Mr. Murphy, reasonable minds could differ as to newsworthiness. Therefore, the demurrers to plaintiffs' cause of action for public disclosure of private facts should not have been sustained.[6]

We must reverse the judgment of dismissal when the complaint states a cause of action under any possible legal theory. (*Aubry* v. *Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967.) Having concluded the newsworthiness of plaintiffs' private financial affairs is a question which cannot be resolved as a matter of law on a demurrer, we need not decide whether plaintiffs have stated a cause of action for public disclosure of private facts as to other of the published information. We express no opinion whether identifying plaintiffs, and revealing Christian's illegitimacy, was newsworthy as a matter of law under all the circumstances of this case. We also do not decide whether there was an invasion of Ms. Hood's privacy as to sexual matters. (See *Vinson* v. *Superior Court* (1987) 43 Cal.3d 833, 842-843 [sexual harassment plaintiff had not waived right of "sexual privacy" by claiming emotional distress damages].)

We agree with defendants that lawfully obtained information contained in "public records" generally may

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[6] In a letter brief filed following oral argument in this case, the Enquirer argued that publishing information about an individual's private financial affairs does not give rise to an actionable invasion of privacy *when the information published is newsworthy.* We agree. The issue here is whether, given all the circumstances of this case, plaintiffs' private financial affairs *were* newsworthy. The Enquirer's argument to the contrary notwithstanding, we question whether the details of plaintiffs' private financial affairs had "a 'logical,' [citation], or a 'substantial' 'nexus with a newsworthy topic,' . . . ." The Enquirer contends, "[D]etails such as the level of child support Eddie Murphy was paying, and the price of the house he bought for his son, were a part of the story of his concealing this son from his fiancee." We think a trier of fact could conclude differently.

be published except when a narrowly tailored interest of the highest order is present. (See *The Florida Star* v. *B. J. F.* (1989) 491 U.S. 524, 531, 541 [no civil liability under state statute where name of rape victim obtained from police report released to the press]; *Smith* v. *Daily Mail Publishing Co.* (1979) 443 U.S. 97, 103 [no liability under state statute where name of alleged juvenile assailant obtained from police band radio frequency, witnesses, the police, and a local prosecutor]; *Cox Broadcasting Co.* v. *Cohn* (1975) 420 U.S. 469, 491 [no actionable invasion of privacy (public disclosure of private facts) where name of rape-murder victim obtained from judicial records open to public inspection].)[7] We need not address the issue of matters purportedly obtained from alleged public records. Because the present case comes before us at the pleading stage, there is no evidence how or when the Enquirer secured the so-called public records. There is an evidentiary void before us in that regard.

C. Intrusion Upon Solitude or Into Private Affairs

In *Miller* v. *National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1482, the Court of Appeal set forth the elements of a cause of action for intrusion upon solitude or into private affairs as follows: "The case at bench involves the first category of privacy rights, the right to be secure from *intrusion*. Restatement Second of

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[7] In a different context, the United States Supreme Court recently held, "An individual's [privacy] interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." (*Department of Defense* v. *FLRA* (1994) 510 U.S. ——, 127 L.Ed.2d 325, 337.) The case involved a union's access under the Freedom of Information Act (FOIA) to employee home address lists. The court held disclosure of the home addresses would constitute a " 'clearly unwarranted invasion of personal privacy' " within the meaning of a FOIA exception to disclosure (5 U.S.C. § 552(b)(6)). (*Id.* at p. ——, 127 L.Ed.2d at p. 338.)

Torts, section 652B declares that, '[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, *if the intrusion would be highly offensive to a reasonable person.*' (Italics added.)" (Accord, *Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 24; *Forsher* v. *Bugliosi, supra,* 26 Cal.3d at p. 808.) Publication or actual trespass are not necessary elements of the tort. (*Miller* v. *National Broadcasting Co., supra,* 187 Cal.App.3d at p. 1484.) The Restatement Second of Torts offers some examples of the type of intrusion which gives rise to the tort: "The invasion may be by physical intrusion into a place in which the plaintiff has secluded [herself or] himself, as when the defendant forces [her or] his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering [her or] his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into [her or] his upstairs windows with binoculars or tapping [her or] his telephone wires. It may be by some other form of investigation or examination into [her or] his private concerns, as by opening [her or] his private and personal mail, searching [her or] his safe or [her or] his wallet, examining [her or] his private bank account, or compelling [her or] him by a forged court order to permit an inspection of [her or] his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of photograph or information outlined." (Rest.2d, Torts, § 652B, com. b, pp. 378-379.) Decisional authority also illustrates the type of intrusion required: e.g., *Miller* v. *National Broadcasting Co., supra,* 187 Cal.App.3d at page 1484 [television camera crew followed paramedics into home and filmed efforts to save heart attack victim]; *Vescovo* v. *New Way Enterprises, Ltd.* (1976) 60 Cal.App.3d 582, 587-588 [physical in-

trusion by unsavory characters on solitude in plaintiff's home]; *Noble* v. *Sears, Roebuck & Co.* (1973) 33 Cal. App.3d 654, 659-660 [private investigator secured information from hospitalized plaintiff by deception]; and *Dietemann* v. *Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248 [secretly photographing and electronically recording and transmitting conversations in plaintiff's home].

No intrusion of the type discussed above was alleged in the present case. Plaintiffs argue two intrusions were alleged: "[f]irst, . . . that defendant Barbara Moss . . . took an *unauthorized photograph* of plaintiffs[;] and second, that defendants subsequently published an unnewsworthy article *containing the intrusive photograph* and other photographs of plaintiffs' home and car." (Emphasis added.) However, there was no allegation that the photograph of plaintiffs, even if unauthorized, was taken in an intrusive manner. The taking of a photograph in a pose voluntarily assumed in a public place does not constitute an invasion of privacy. (*Gill* v. *Hearst Publishing Co.* (1953) 40 Cal.2d 224, 230 [public market place]; accord, e.g., *Muratore* v. *M/S Scotia Prince* (Me. 1987) 656 F.Supp. 471, 483, aff'd. in part, vac. in part (1st Cir. 1988) 845 F.2d 347 [public areas of cruise ship]; *Fogel* v. *Forbes, Inc.* (E.D.Pa. 1980) 500 F.Supp. 1081, 1087 [Miami International Airport].) There was no allegation the unauthorized photograph of plaintiffs' was taken surreptitiously or in a private place. (*Ibid.*; compare, e.g., *Dietemann* v. *Time, Inc., supra,* 449 F.2d at p. 248 [individual secretly photographed in home]; *Rafferty* v. *Hartford Courant Co.* (Conn.Super. 1980) 416 A.2d 1215, 1220-1221 [newspaper reporter and photographer attended private party uninvited]; *Barber* v. *Time, Inc.* (Mo. 1942) 159 S.W.2d 291, 295-296 [surreptitious photograph taken in patient's hospital room].) There was no allegation the photograph itself portrayed plaintiffs in an offensive manner. (*Gill* v. *Hearst Publishing Co., supra,* 40 Cal.2d at p. 231.) Furthermore, the subsequent publication of the photo-

graph does not in itself constitute *an intrusion.* In *Gill* v. *Hearst Publishing Co., supra,* 40 Cal.2d at page 231, the California Supreme Court held: "Plaintiffs have failed to cite, and independent research has failed to reveal, any case where the publication of a mere photograph under the circumstances here prevailing—a picture (1) taken in a pose voluntarily assumed in a public place and (2) portraying nothing to shock the ordinary sense of decency or propriety—has been held an actionable invasion of the right of privacy. To so hold would mean that plaintiffs 'under all conceivable circumstances had an absolute legal right to [prevent publication of] any photograph of them taken without their consent. If every person has such a right, no [periodical] could lawfully publish a photograph of a parade or a street scene. We are not prepared to sustain the assertion of such a right.' [Citations.]" (Accord, *Aisenson* v. *American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 162-163.) Therefore, plaintiffs did not allege an invasion of privacy by intrusion upon their solitude or into their private affairs and the trial court properly sustained the demurrer to that cause of action.

In their brief on appeal, plaintiffs set forth additional facts concerning the taking of the photograph by a defendant, Ms. Moss, which facts were not included in the complaint. For the first time on appeal, defendants assert: Ms. Moss was a relative of a friend of Ms. Hood; Ms. Moss took the photograph at a private dinner; and she subsequently sold the photograph to the Enquirer. Plaintiffs cite *Pearson* v. *Dodd* (D.C. Cir. 1969) 410 F.2d 701, 703-708, for the proposition that in so doing Ms. Moss committed the tort of intrusion into private matters. That case is inapposite. The undisputed facts in *Pearson* were that: on several occasions two former employees, with the help of two current staff members of former Senator Thomas Dodd of Connecticut, entered his office without his knowledge or permission; removed documents from his files; copied the papers; replaced the

originals; and turned the copies over to Jack Anderson, a newspaper columnist. Mr. Anderson and another columnist, Drew Pearson, published articles containing information gleaned from the documents. (*Id.* at p. 703.) The columnists received the copies of the documents knowing that they had been removed without authorization. (*Id.* at p. 705.) The question whether Senator Dodd's present and former employees had committed the tort of intrusion was not before the court. The court assumed, *without deciding,* "that [Senator Dodd's] employees and former employees did commit such an improper intrusion when they removed confidential files with the intent to show them to unauthorized outsiders." (*Id.* at pp. 704-805, fn. omitted.) The circumstances alleged in the present case are not arguably directly analogous to those in *Pearson.*

The facts asserted in plaintiffs' brief on appeal do not rise to the level of an intrusion. The facts asserted are that Ms. Moss took an unauthorized photograph of plaintiffs at a private dinner and then sold it to the Enquirer. Assuming the photograph *was* taken at a private dinner, we do not know whether Ms. Moss was an invited guest or an uninvited intruder at that dinner. There are no allegations as to whether plaintiffs posed for their picture or were unaware their photograph was being taken. We do not know whether they asked Ms. Moss *not* to take their photograph. Further, there is no claim Ms. Moss took the photograph with the intention of selling it to a third party. These pertinent and essential facts were not alleged.

Finally, even if the facts presented for the first time on appeal could have been inserted in an amended pleading, they may not be relied upon now as a basis for contending that the demurrer should not have been sustained. Plaintiffs conceded they had stated the facts as strongly as possible. They acquiesced in the court's order that the demurrers be sustained *without leave to amend.* On ap-

peal, they have not argued leave to amend should have been granted. It is a black letter rule of California law that when a plaintiff elects not to amend, despite having been given the opportunity to do so, no additional facts may be considered for the purposes of determining whether the judgment of dismissal must be affirmed. In *Casella* v. *City of Morgan Hill* (1991) 230 Cal.App.3d 43, 48, the Court of Appeal stated: " 'Where the trial court sustained a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against plaintiff, "if the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal must be affirmed. [Citations.]" [Citation.]' " This is a well established rule of appellate review. (*Vaughn* v. *Hugo Neu Proler International, supra,* 223 Cal.App.3d at p. 1616; *Terminals Equipment Co.* v. *City and County of San Francisco* (1990) 221 Cal.App.3d 234, 241-242; *Shick* v. *Lerner* (1987) 193 Cal.App.3d 1321, 1327; *Lyon* v. *Western Title Ins. Co.* (1986) 178 Cal.App.3d 1191, 1204; *Otworth* v. *Southern Pac. Transportation Co., supra,* 166 Cal.App.3d at p. 457; *Sarro* v. *Retail Store Employees Union* (1984) 155 Cal.App.3d 206, 211; *Logan* v. *Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 127; *Hooper* v. *Deukmejian* (1981) 122 Cal.App.3d 987, 994.) Accordingly, that additional facts could have been alleged is irrelevant in terms of appellate review in this case. Plaintiffs chose not to seek leave to amend. Further, because the demurrer was properly sustained to the intrusion upon solitude or into private affairs cause of action, the dismissal of that cause of action must be affirmed on appeal.

D. Invasion of the Constitutional Right of Privacy

Article I, section 1 of the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." The last phrase, "and privacy," was added to the California Constitution in 1972 by voter initiative. The initiative created a right of action against private as well as government entities. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 20.)

In *Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at pages 39-40, an action for injunctive relief, our Supreme Court held the elements of a cause of action for invasion of the state constitutional right of privacy are as follows: "Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. [¶] Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law."

As we have noted, there are three elements of a constitutional privacy invasion claim. Elaborating on the first element of the constitutionally based cause of action discussed in *Hill,* our Supreme Court related the following:

"The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 35.) As to the second element of the constitutional cause of action, the court held whether a reasonable expectation of privacy exists depends on: the circumstances of the particular case; the customs, practices, and physical settings surrounding particular activities; and the existence of broad based and widely accepted community norms and customs. (*Id.* at pp. 36-37.) With respect to the third element of the constitutional privacy right discussed in *Hill,* our Supreme Court explained: "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. 'Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which [she or] he is a part.' (Rest.2d Torts, *supra,* § 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Id.* at p. 37.) All of the three elements of a constitu-

tional right of privacy claim must be present in order for there to be a valid cause of action. (*Id.* at pp. 39-40.)

In *Hill,* our Supreme Court set forth several of the pertinent defenses to a state constitutional privacy claim. Our Supreme Court held: "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiffs, in turn, may rebut a defendant's assertion of countervailing interest by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 40.) Additionally, our Supreme Court described the legal and factual nature of such defenses as follows: "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Ibid.*)

In *Hill,* the California Supreme Court considered whether the National Collegiate Athletic Association's (NCAA) drug testing program violated the state constitutional right to privacy. The court held as a matter of law that legally protected privacy interests were at stake. For example, there was an interest in freedom from observation in performing bodily functions (urination) recognized by social norms as private; an "autonomy privacy" interest. Further, the *Hill* court determined there was an interest in limiting disclosure of information about

the internal medical state of a person's body; an "informational privacy" interest. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at pp. 40-41.) With respect to the autonomy interest, the court found that the athletes' reasonable expectation of privacy was diminished. This was because participation in intercollegiate athletics involved close regulation and scrutiny of physical fitness and condition. Also, the NCAA's drug testing program was fully disclosed to the athletes who were given an opportunity to consent or refuse before testing. (*Id.* at pp. 41-42.) The court found that despite the athlete's diminished expectations of privacy, the invasion was potentially serious because the NCAA used a particularly intrusive procedure to monitor urination. (*Id.* at p. 43.) The NCAA asserted the intrusion was justified to safeguard the integrity of intercollegiate athletics and to protect the health and safety of the students who participated in athletic events. (*Id.* at pp. 43-44.) The court concluded the NCAA's motives and objectives were "reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition." (*Id.* at p. 44.) The court also held the drug testing program was beneficial to the athletes and those benefits offset the limited impact on privacy interests. (*Id.* at p. 45.) After similarly considering the informational privacy interest, the court concluded the NCAA testing program did not violate the state constitutional right to privacy. (*Id.* at p. 57.)

Our Supreme Court again considered the state constitutional right to privacy several months later in *Heller* v. *Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 42-44 (cert. den. December 12, 1994). The plaintiff alleged a treating physician, Dr. Yamaguchi, had violated her constitutional right to privacy by discussing her medical condition with the malpractice insurer for a colleague, Dr. Geis, she had sued for malpractice. The Court of Appeal had reversed a trial court order dismissing the invasion of privacy claim. Applying its recent decision in *Hill,* our

Supreme Court held the plaintiff could not state a cause of action for invasion of privacy. No constitutional claim under article I, section 1 of the California Constitution could be stated the court reasoned, because the plaintiff had no reasonable expectation of privacy as to her medical condition under the circumstances. (*Id.* at p. 43.) As noted previously, in *Hill*, our Supreme Court identified a reasonable expectation of privacy as the second essential element of a state constitutional claim under article I, section 1. (*Hill* v. *National Collegiate Athletic Assn., supra*, 7 Cal.4th at p. 36.) In *Heller*, our Supreme Court determined that the absence of a reasonable expectation of privacy was premised on the following factors: (1) the plaintiff had placed her physical condition in issue in the malpractice litigation, thereby substantially lowering her privacy expectation (*Heller* v. *Norcal Mutual Ins. Co., supra*, 8 Cal.4th at p. 43); (2) she should have been aware her medical condition would be an issue in the malpractice litigation (*id.* at p. 44, fn. 5); and (3) given the litigation, her medical condition would have been inevitably discovered because Dr. Yamaguchi was to testify as an opinion witness in the malpractice lawsuit. (*Id.* at p. 44.)

We must consider whether plaintiffs have stated a cause of action for invasion of their constitutional right of privacy as that cause of action is defined in *Hill* and *Heller*. First, plaintiffs' legally protected privacy interests are implicated. The present case involves the first class of the two legally recognized privacy interests identified in *Hill*; *viz.* an interest in precluding the dissemination of confidential information or " 'informational privacy.' " (*Hill* v. *National Collegiate Athletic Assn., supra*, 7 Cal.4th at p. 35.) Specifically, plaintiffs had a constitutionally protected privacy interest in their personal financial affairs. (*Doyle* v. *State Bar, supra*, 32 Cal.3d at p. 19; *Valley Bank of Nevada* v. *Superior Court, supra*, 15 Cal.3d at p. 656.) Hence, the first element of the cause of action has been sufficiently plead. (*Hill* v. *National*

Collegiate Athletic Assn., supra, 7 Cal.4th at pp. 39-40.)

The second element of the cause of action is a reasonable expectation of privacy under the circumstances considering community norms, customs, and practices. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at pp. 36-37, 39-40.) That element presents a mixed question of fact and law. (*Ibid.*) As previously discussed in section III.B. of this opinion, plaintiffs' expectation of privacy may have been diminished to some extent by reason of their close association with a celebrity. That association, however, did not extinguish both plaintiffs' expectation of privacy. (*Carlisle* v. *Fawcett Publications, Inc., supra,* 201 Cal.App.2d at p. 747.) As discussed in section III.B. of this opinion, above, we cannot say as a matter of law that plaintiffs' association with Mr. Murphy, contacts they sought to keep private, rendered any expectation of privacy as to their affairs, most notably personal financial matters, unreasonable. Considering community norms, customs, and practices, a trier of fact could conclude that under the circumstances of this case plaintiffs had a reasonable expectation of privacy as to at least some of the information published. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at pp. 36-37.) Therefore, we conclude that the second element of the cause of action has been sufficiently plead.

The third element of the cause of action is a serious invasion of privacy resulting from a defendant's conduct. (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal. 4th at pp. 39-40.) That element also presents a mixed question of fact and law. (*Id.* at p. 40.) Our Supreme Court described this third element as follows: "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing

an alleged invasion of privacy." (*Id.* at p. 37.) Plaintiffs alleged the combined disclosures of their identities, the location of their home, and their financial condition, exposed them to an "unreasonable risk as targets of kidnappers, extortionists, or persons interested in harassment." It was also alleged Ms. Hood had in fact experienced such harassment. Moreover, numerous details of plaintiffs' private financial affairs were published. Given these facts, we cannot say as a matter of law that no serious invasion of privacy resulted from defendants' conduct.

Finally, plaintiffs' privacy interests must be balanced against the Enquirer's constitutionally protected interest in publicizing newsworthy information. Considering the Enquirer's countervailing interest as a threshold question of law (*Hill* v. *National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 40), we do not find as a matter of law that it is of sufficient strength to override plaintiffs' privacy interest as to *all* of the information published. To the extent the publication of certain information, most notably plaintiffs' personal financial affairs, was unnecessary to the story the tabloid sought to tell, a trier of fact could conclude the Enquirer's countervailing interest did not override plaintiff's constitutional right to privacy. In conclusion, plaintiffs have adequately stated a cause of action for violation of their state constitutional right to privacy. Therefore, it was error to sustain defendants' demurrers to that cause of action without leave to amend.

E. Civil Code Section 3344 (Misappropriation)

Plaintiffs have asserted a statutory misappropriation cause of action as to Christian only. The complaint alleges the Enquirer knowingly used Christian's photograph and likeness, without his consent, in an advertisement broadcast nationwide for the purpose of promoting sales of the publication. It is further alleged: "Defendants' conduct involved the appropriation of a photograph of Christian, and Christian is readily identifiable in the

photograph . . . . Christian's face is clearly visible and distinguishable. The photograph appears to be doctored so that the face of Christian is set upon a different body. The figure is partially animated and moving a portion of his body in the commercial." [8]

Civil Code section 3344 was enacted in 1971. (Stats. 1971, ch. 1595, § 1, p. 3426.) Civil Code section 3344, subdivison (a) provides in relevant part that "Any person who knowingly uses another's name, . . . photograph, or likeness, in any manner, . . . for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of [her or] his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. . . ." Civil Code section 3344, subdivision (d) provides: "For purposes of this section, a use of a name, . . . photograph, or likeness *in connection with any news,* public affairs, or sports *broadcast or account,* or any political campaign, shall not constitute a use for which consent is required under subdivision (a)." (Emphasis added.)

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[8] Plaintiffs have lodged a videotape of the Enquirer commercial with this court. However, the videotape was not made a part of the complaint in this action. Nor was it considered by the trial court in ruling on the demurrers. Moreover, contrary to plaintiffs' assertion at oral argument, the videotape is not a fact or proposition that is "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Therefore, we have not considered it.

The "news account exemption" set forth in Civil Code section 3344, subdivision (d) has been construed in several cases. In *Eastwood* v. *Superior Court, supra,* 149 Cal.App.3d at pages 413-415, the Enquirer had published an article about Clint Eastwood's purported romatic involvements with two other celebrities. Mr. Eastwood alleged his name and photograph were used without his consent on the cover of the publication and in a telecast advertisement both of which uses were calculated to promote sales of the Enquirer. (*Id.* at p. 415.) The Enquirer argued the use of Mr. Eastwood's name and photograph in the telecast advertisements and on the cover were subject to the news account exemption. (*Id.* at p. 421.) Division Seven of this appellate district disagreed. The court held that because the article was allegedly *entirely false,* it did not fall within the news account exemption. The court held Mr. Eastwood could show that the use of his name and photograph in connection with a "news account, allegedly false but presented as true" was "a subterfuge or coverup for commercial exploitation." (*Id.* at p. 240.) Our colleagues in Division Seven concluded the uses were not subject to the news account exemption because, "[T]he deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable when it is presented to the reader as if true with the requisite scienter. [Citations; fn. omitted.]" (*Id.* at p. 426.)

Eastwood was distinguished in *Maheu* v. *CBS, Inc., supra,* 201 Cal.App.3d at pages 676-677, a case decided by Division Four of the Court of Appeal for this appellate district, in an opinion by then Associate Justice Ronald George. *Maheu* arose out of the publication of *Citizen Hughes,* a book about Howard Hughes. Robert Maheu, the plaintiff, was a former aide to Howard Hughes. (*Id.* at p. 667.) The plaintiff alleged the defendants had misappropirated his name, likeness, and personality by writing, publishing, and commercially distributing Citizen Hughes. (*Id.* at p. 676.) In discussing

the plaintiff's cause of action for public disclosure of private facts, the court held Mr. Maheu was a public figure and that the facts published had social value, therefore "newsworthiness was clearly established." (*Id.* at p. 675.) In considering the plaintiff's statutory misappropriation claim, the court noted that the *Eastwood* case had involved an article which was allegedly entirely false. (*Id.* at p. 677.) The court concluded: "Since [the plaintiff] does not dispute the truthfulness of the matters published, the material is protected as a news account under section 3344, subdivision (d)." (*Ibid.*)

Dora v. *Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 540-546, involved a documentary produced in 1987 about famous surfers. The plaintiff had been a " 'legendary figure in surfing' " in the 1950's. (*Id.* at p. 540.) He objected to the producers' use of his name, photograph, likeness, and voice in the documentary. (*Ibid.*) Division Two of this appellate district held the documentary fell within the exemption for "public affairs" contained in Civil Code section 3344, subdivision (d), which provides consent is unnecessary when use is in connection with "any news, public affairs, or sports broadcast or account, . . ." The court defined the term "public affairs" in Civil Code section 3344, subdivision (d) as follows: "We . . . presume that the term 'public affairs' was intended to mean something less important than news. [Citation.]" (*Id.* at p. 545.) The court concluded: "Public affairs must be related to real-life occurrences. As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it. For that reason, we cannot limit the term 'public affairs' to topics that might be covered on public television or public radio. To do so would be to jeopardize society's right to know, because publishers and broadcasters could be sued for use of name and likeness in documentaries on subjects that do not relate to politics or public policy, and may not

even be important, but are of interest." (*Id.* at pp. 545-546.) The court also held the newsworthiness factors relevant to a claim for public disclosure of private facts were not relevant to a statutory cause of action for appropriation of name and likeness. (*Id.* at p. 543.)

The Ninth Circuit Court of Appeals has also considered this issue. In *New Kids on the Block* v. *New America Pub., Inc.* (9th Cir. 1992) 971 F.2d 302, 309-310, two newspapers advertised 900-number phone-in polls to determine which of the individual members of the musical group New Kids on the Block was the most popular. The plaintiffs contended the use of their group's name amounted to a misappropriation under Civil Code section 3344. The Ninth Circuit Court of Appeals held the newspapers had a complete defense to the claim because they used the musical group's name " 'in connection with' " news accounts. (*Id.* at p. 310.) The newspapers ran articles about the New Kids on the Block concurrently with or subsequent to the 900-number polls. In addition, both papers had "an established track record" of running polls and then reporting the results in a later news story. (*Ibid.*)

In the present case, plaintiffs allege Christian's doctored photograph was used to advertise an article in the Enquirer in order to boost sales of the tabloid. Here, as in *Maheu* v. *CBS, Inc., supra,* 201 Cal.App.3d at pages 676-677, they do not allege the article was false in any respect. Therefore, this case is unlike *Eastwood* v. *Superior Court, supra,* 149 Cal.App.3d at pages 421-426. Whether all of the facts published were newsworthy is not at issue in considering this cause of action. (*Dora* v. *Frontline Video, Inc., supra,* 15 Cal.App.4th at p. 543.) Moreover, celebrities' private lives are news matters. (E.g., *Time Inc.* v. *Sand Creek Partners, supra,* 825 F.Supp. at p. 212 [photograph of Lyle Lovett and Julia Roberts on their wedding day]; *Eastwood* v. *Superior Court, supra,* 149 Cal.App.3d at p. 423 [Mr. Eastwood's

romantic involvement with female celebrities].) Therefore, the alleged appropriation falls within the news account exemption of Civil Code section 3344, subdivision (d).

We reject plaintiffs' contention the television commercial featuring the doctored photograph of Christian "constitutes an entirely *new* commercial appropriation." Plaintiffs argue that the news account exemption applies only to the "re-use" in advertising the story of the exact photograph published with the news account. In the present case, they assert, the Enquirer "created a *new* commercial appropriation" when they doctored Christian's photograph and "used it directly to sell their product." Plaintiffs cite *Fairfield* v. *American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, 86-88, *Williams* v. *Weisser* (1969) 273 Cal.App.2d 726, 741-742, and *Stilson* v. *Reader's Digest Assn., Inc.* (1972) 28 Cal.App.2d 270, 275. However, none of those cases involved an appropriation of a photograph in connection with a news account. Further, none involved a claim under Civil Code section 3344 or an analogous statute.[9] Moreover, we have found

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[9] In *Fairfield* v. *American Photocopy etc. Co., supra,* 138 Cal. App.2d at page 87, a photocopier manufacturer falsely advertised that the plaintiff, an attorney, was a satisfied user of its machine. The court held the plaintiff had a viable claim for invasion of privacy because the widely circulated advertisement "amounted to a pretended endorsement or recommendation of defendant's product" and "was an unauthorized and unwarranted appropriation of plaintiff's personality as a lawyer for pecuniary gain and profit." (*Ibid.*) Similarly, in *Williams* v. *Weisser, supra,* 273 Cal.App.2d at pages 741-742, the plaintiff was an assistant professor of anthropology at the University of California at Los Angeles (UCLA). The defendant was a publisher of notes of lectures given by UCLA professors. The defendant published notes of plaintiff's lectures. Also, the defendant used the plaintiff's name in selling the publications. The court held the case was indistinguishable from *Fairfield* v. *American Photocopy etc. Co., supra* 138 Cal.App.2d at page 87. (*Williams* v. *Weisser, supra,* 273 Cal.App.2d at p. 742.) The issue in *Stilson* v. *Reader's Digest Assn, Inc., supra,* 28 Cal.App.3d at page 275, was whether the trial court had properly barred a class action claim. The plaintiff members of the proposed class

no legal authority for the precise proposition advanced here.

F. Common Law Appropriation

Plaintiffs allege defendants appropriated their names, likenesses, and photographs, as well as photographs of their home and their car. They allege the appropriations were without their consent and caused injury to them. A common law claim for appropriation of name, picture, or identity has the following elements: (1) appropriation of the plaintiff's name, picture or identity; (2) for the defendant's own purposes or benefit, commercial or otherwise; (3) without the plaintiff's consent; (4) where the plaintiff's privacy interests outweigh any public interest in the publication; and (5) the appropriation caused the plaintiff harm, injury, damage, or loss. (*Eastwood* v. *Superior Court, supra,* 149 Cal.App.3d at p. 417; BAJI No. 7.23 (8th ed. 1994) p. 316.)[10] Lack of newsworthiness is not an element of the tort. (Comment, BAJI No. 7.23 (8th ed. 1994) p. 317.) However, the news account exemption codified in Civil Code section 3344, subdivision (d), is a defense to the common law as well as the statutory cause of action. (*Eastwood* v. *Superior Court, supra,* 149 Cal.App.3d at p. 421; *New Kids on the Block*

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were individuals whose names had been used without their consent in letters soliciting participation in two Readers' Digest sweepstakes which letters were designed "ultimately" to secure subscriptions. (*Id.* at p. 272.) The court cited *Fairfield* v. *American Photocopy etc. Co., supra* 138 Cal.App.2d at page 87, for the proposition the unauthorized use of a person's name for commercial exploitation was actionable. (*Williams* v. *Weisser, supra,* 273 Cal.App.2d at p. 742.) The court held, however, that the proposed class action involving millions of unnamed plaintiffs "would foist upon our judicial system an intolerable burden, . . ." (*Id.* at p. 274.)

[10] The fourth element, balancing the plaintiff's privacy interests against the pubic interest in the publication, is not mentioned in *Eastwood,* but is included in BAJI No. 7.23 as derived from *Gill* v. *Curtis Publishing Co., supra,* 38 Cal.2d at pages 278-279.

v. *News America Pub., Inc., supra,* 971 F.2d at pp. 309-310; Comment, BAJI No. 7.23 (8th ed. 1994) p. 318.) Because the publications at issue here were in connection with a news account, they are not actionable as appropriations under the common law. (*Ibid.*) Therefore, the trial court properly sustained the demurrer to this cause of action without leave to amend.

IV. DISPOSITION

The judgment of dismissal is reversed in part. The orders sustaining the demurrers of defendants, National Enquirer, Inc., Barbara Marks, Doug Mays, Martin Dryan, and Barbara Moss to the third cause of action (public disclosure of private facts) and the fifth cause of action (constitutional right to privacy) without leave to amend are reversed. The dismissal order as to the third and fifth causes of action are reversed. The court is directed to enter an order overruling the demurrers to the third and fifth causes of action. The orders sustaining the demurrers to the first (Civil Code section 3344), second (common law appropriation) and fourth (intrusion into private matters) causes of action without leave to amend are affirmed. Plaintiffs, Tamara Hood and Christian M., are to separately recover their costs on appeal, jointly and severally, from defendants, the National Enquirer, Inc., Barbara Marks, Doug Mays, Martin Dryan, and Barbara Moss.

NOT TO BE PUBLISHED

TURNER, P.J.

We concur:

ARMSTRONG, J.

GODOY PEREZ, J.

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 03/30/95

Paul K. Dueffert
725 12th Street N.W.
Washington, DC. 20005

RE: Hood, Tamara
vs.
National Enquirer, Inc
2 Civil B082611
Los Angeles NO. BC088691

THE COURT:

Petition for rehearing denied.

APPENDIX C

Second Appellate District, Division Five, No. B082611

S046100

[Filed Jun 21 1995]

IN THE SUPREME COURT OF CALIFORNIA

TAMARA HOOD *Et Al.*,
Appellants

v.

NATIONAL ENQUIRER INCORPORATED *Et Al.*,
Respondents

Respondents' petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

/s/
Chief Justice

APPENDIX D

[SUPERIOR COURT]
[STATE OF CALIFORNIA]
[COUNTY OF LOS ANGELES]

LAW & MOTION
JUDGE RICHARD KALUSTIAN

HEARING DATE: 1/12/94

CALENDAR NO.: 8

CASE NAME: *Hood, et al. v. National Enquirer, Inc., et al.*

CASE NO: BC 88691

SERVICE: timely opposition

TYPE OF MOTION:

1. admission pro hac vice;
2. demurrer to complaint.

TENTATIVE RULING:

1. Application by Gerson A. Zweifach, Paul K. Dueffert and Thomas G. Hentoff for admission pro hac vice is granted. No opposition was filed.

2. Plaintiff's request for judicial notice is denied. Demurrer to complaint is sustained without leave to amend. Plaintiffs do not dispute the truth of the subject article. The Comedian/actor, Eddie Murphy, is a celebrity and newsworthy. The subject article concerns Eddie Murphy and plaintiffs by virtue of their relationship to Eddie Murphy. The statutory and common law appropriation causes of action are barred by Civil Code section 3344(d). The cause

of action for violation of the right to privacy is similarly barred on the ground of newsworthiness. There is no cause of action for public disclosure of private facts or intrusion. The facts contained in the subject article are newsworthy, or are not private (i.e., that Eddie Murphy is Christian's father) or are not offensive (i.e., that Christian is a millionaire). There is no cause of action for intrusion stated. The facts were newsworthy and no allegations of physical intrusion are pled. Moving parties shall submit an original and 1 copy of a proposed judgment of dismissal to Dept. 17 within 5 days.

APPENDIX E

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

DEPARTMENT NO. 17

HON. RICHARD P. KALUSTIAN, JUDGE

BC 088691

TAMARA HOOD, *et al.*,
Plaintiffs,

vs.

THE NATIONAL ENQUIRER, INC.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JANUARY 12, 1994

* * * *

[19] THE COURT: . . . I have a question. I am going to stay with my tentative. It's sustained. Demurrer is sustained as to all parties.

I have a question about with or without leave to amend. I suspect that you are telling me that you have alleged whatever it is possible to allege at this point. And I don't want to sustain it with leave if we are going through this exercise again, not that it hasn't been enjoyable, and to read the cases and the declarations. But I suspect this matter is going to go up. And it probably should go up. I have no problem with that.

But I don't want to delay that process another 6 or 8 months with demurrers sustained with leave to amend and

everybody struggles to add facts, but can't. And at the end of 8 months, three demurrers sustained and then it goes up. I think now is the time to take it up if you are going to take it up.

Is that a logical approach?

[20] MS. GORDON [Counsel for Plaintiffs]: I believe so, Your Honor.

THE COURT: All right. That's my feeling. My decision is based on the law.

* * * *

APPENDIX F

WILLIAMS & CONNOLLY
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Attorneys for Defendants
National Enquirer, Inc.
and Barbara Hannah Grufferman

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. BC 088691
[Assigned to Judge Richard Kalustian]

TAMARA HOOD, an individual; and CHRISTIAN MURPHY, a minor, by and through TAMARA HOOD, Guardian Ad Litem for CHRISTIAN MURPHY,

Plaintiffs,

VS.

NATIONAL ENQUIRER, INC.; BARBARA MARKS, an individual; BARBARA MOSS, an individual; DOUG MAYS, an indivdual; MARTIN DRYAN, an individual; and DOES 1-20,

Defendants.

FINAL JUDGMENT

The demurrer of defendants National Enquirer, Inc. and Barbara Hannah Grufferman to each and every cause of action (first through fifth) of complaint of Tamara Hood and Christian Murphy, joined by defendant Barbara Moss, came before the Court for hearing on January 12, 1994, in Department 17.

Upon reviewing and considering the demurrer and memorandum of points and authorities filed by defendants National Enquirer, Inc. and Barbara Hannah Grufferman, the joinder filed by defendant Barbara Moss, the oppositions filed by plaintiffs, the reply memorandum filed by defendants National Enquirer, Inc. and Barbara Hannah Grufferman, the records of the Court in this action, all matters of which the Court may take judicial notice, and the arguments of counsel at the hearing, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' demurrer to each and every cause of action (first through fifth) of the complaint is sustained without leave to amend, and that this action is DISMISSED WITH PREJUDICE.

Dated: Feb 2, 1994

/s/ Richard P. Kalustian
HONORABLE RICHARD KALUSTIAN
Judge of the Superior Court

APPENDIX G

Constitutional Provisions

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> Section 1 . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 1, of the Constitution of California provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Supreme Court, U.S.
FILED
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No. 95-468

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL ENQUIRER, INC., and
BARBARA HANNAH GRUFFERMAN,
Petitioners,

vs.

TAMARA HOOD AND CHRISTIAN
EDWARD MURPHY BY TAMARA HOOD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the First and Fourteenth Amendments permit a jury to consider imposing liability under state privacy laws for truthful publication about private persons with an unpublicized relationship to a public figure, if a jury could find that facts published were within the narrow range of facts within the intimate details of plaintiffs' lives, the disclosure of the facts could be found to be highly offensive to a reasonable person with ordinary sensibilities and were not newsworthy?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-468

National Enquirer, Inc., and
Barbara Hannah Grufferman,
Petitioners,

v.

Tamara Hood and Christian
Edward Murphy by Tamara Hood,
Respondents.

**Petition for a Writ of Certiorari to the
California Court of Appeal
Second Appellate District**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent opposes the Petition for a Writ of Certiorari to review the unpublished judgment of the California Court of Appeal, Second Appellate District, entered in this case on March 10, 1995.

STATEMENT

A. The Article.

Plaintiffs have never sought publicity about their relationships with Eddie Murphy. No prior press report identified plaintiff Christian Edward Murphy as Mr. Murphy's son or Tamara Hood as Christian's mother. Plaintiffs sought only to be left alone in the privacy of their lives.

In September 1992 the National Enquirer shattered that privacy not only by identifying Christian as Eddie Murphy's son but by publishing detailed information about plaintiffs' financial affairs and information about where plaintiffs lived, including a photograph of the house. Plaintiffs had never disclosed such information publicly. None of this information was relevant to any public controversy. The only basis for any public interest in plaintiffs at all was based on their private connection to a prominent celebrity. This connection, though, was never published before and plaintiffs had sought and endeavored to keep this connection private.

B. The Court of Appeal's Decision.

The Court of Appeal's decision came in the context of the dismissal of all of plaintiffs' claims in the trial court on a demurrer without consideration of conflicting facts. Applying California law regarding the tort of "public disclosure of private facts" and the explicit right of privacy adopted by the voters in Article I, Section 1 of the California Constitution, the Court found that the trial court erred when it sustained the Enquirer's

First Amendment defense to plaintiffs' claims as a matter of law.[1]

On the "public disclosure of private facts" claim, the Court found that plaintiffs had sufficiently alleged the public disclosure of private facts in this case. Pet. App. 6a. The Court found that the issue of whether the disclosure of these facts would be considered highly offensive and objectionable to a reasonable person was an issue that could not be decided as a matter of law. Pet. App. 7a.

The Court also found that the issue of whether the Enquirer was privileged to publish such private information because it was "newsworthy" could not be decided in the context of a demurrer as a matter of law. The Court recognized that people with some connection to celebrities lose their privacy only "to some extent" and not completely. Pet. App. 10a, citing *Carlisle v. Faucett Publications*, 201 Cal.App.2d 733, 747 (1962). While recognizing that plaintiffs were not insulated completely from public exposure merely because they are not public figures and sought no publicity concerning their lives or their connection with Eddie Murphy, the Court found that it could not decide as a matter of law that plaintiffs' connection with a celebrity made all their financial affairs a matter of public concern. Pet. App. 13a.

The Court reached the same conclusion regarding plaintiffs' privacy claim under Article I, § 1 of the California Constitution. Pet. App. 25a. Finding that California's constitutional right of privacy protected

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[1] The Court of Appeal affirmed the dismissal of three other causes of action.

personal financial information, the Court found that the issue of whether plaintiffs had a reasonable expectation of privacy under the circumstances and whether the invasion of plaintiffs' privacy was serious enough to satisfy the requirements of California law could not be decided as a matter of law given the allegations in plaintiffs' complaint. Pet. App. 26a-27a.

The Supreme Court of California declined to review the Court of Appeal's unpublished decision and the trial court has resumed jurisdiction over the case.

REASONS FOR DENYING THE WRIT

There is nothing in the unpublished judgment and opinion by the Court of Appeal in this case which warrants review by this Court. This Court has never found that the First Amendment provides absolute protection for tabloid newspapers to print any information they uncover free from state laws protecting fundamental privacy interests. Indeed, the Court has repeatedly recognized the importance of such interests. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-346 (1974). Given the fact that the decision below is an interim, unpublished decision, this case is not a suitable vehicle for resolving potential conflicts between First Amendment and fundamental state-protected privacy rights.

I.

THE COURT OF APPEAL'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS

Nothing in the Court of Appeal's description of California privacy is at odds with this Court's cases. Unless this Court adopts the Enquirer's view that anything it prints is by definition a matter of public concern, states must be able to place limits on the media's disclosure of private facts. Any other view is tantamount to abdicating to the editors of the National Enquirer on the question of what is newsworthy. *See Virgil v. Time, Inc.*, 527 F.2d 1122, 1128-1130 (9th Cir. 1975).

California law circumscribes jury discretion in several ways in the context of both of the privacy claims upheld by the Court of Appeal. First, to prove a "public disclosure of private facts" claim a plaintiff must show that the facts disclosed fall within a narrow range of facts within the "intimate details of one's private life . . ." *Wasser V. San Diego Union*, 191 Cal.App.3d 1455, 1460 (1987). Next, the public disclosure must be shown to be highly offensive and objectionable to a reasonable person with ordinary sensibilities. *Forsher v. Bugliosi*, 26 Cal.3d 792, 809 (1980). If all of these elements are met the plaintiff still bears the burden of proving that the disclosure is not constitutionally protected as "newsworthy." *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 129-130 (1983).

The test for "newsworthiness" challenged by Petitioners fairly implements the general principle in the Restatement of Torts that "[s]ome reasonable proportion in also to be maintained between the event or activity

that makes the individual [newsworthy] and the private facts to which publicity is given." Rest.2d Torts, § 652D, com. h, p. 391. The Supreme Court has identified "the social value of the facts published "as one of the factors that may be used to guide a jury in determining whether this "reasonable proportion" is maintained. The use of this factor is in no way comparable to this Court's criticism of the concept of "outrageousness" in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Liability for privacy torts in California law cannot be based simply on jurors' tastes or views. The "public disclosure of private facts" tort in California offers substantial protection for free expression interests while upholding the right of Californians to be "let alone" in their private affairs.

The same is true of the California constitutional right of privacy as it has been expounded in *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994) and *Heller v. Norell Mutual Ins. Co.*, 8 Cal.4th 30 (1994). California's constitutional right of privacy is subject to countervailing interests, including the free expression rights of the media.

This Court has not held that states may not allow juries, with proper instructions, to balance an individual's right to the privacy of his or her financial or other intimate financial information against the public's right to information delivered through the press. Only if the Enquirer is the sole arbiter of the newsworthiness of private financial information in all circumstances may its position be sustained.

Moreover, the procedural posture of this case renders the alleged conflict posed by Petitioners illusory. The Court of Appeal did not endorse a particular set of jury instructions. All the Court did is find that plaintiffs'

privacy claims could not be dismissed as a matter of law. Thus, the precise standards to be applied by a jury have not yet been determined by the California court. Only after the California courts have reached a final decision on the precise standards to be applied by the jury on remand to strike the balance between plaintiffs' right of privacy and the Enquirer's right to publish what it pleases will it be possible to determine -- indeed, even question -- whether the balance drawn is constitutionally impermissible. Thus, the Petition is a premature attempt to invent a conflict with this Court's decisions that does not exist.

As this Court recognized in *Cox Broadcasting Corp. v. Cohn*, "[i]n this sphere of collision between claims of privacy and those of free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." 420 U.S. 469, 491 (1975).[2] Indeed, this Court has repeatedly rejected arguments such as Petitioners' seeking a blanket immunity from state privacy laws for the publication of truthful information. As the Court said in *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989),

> Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring

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[2] Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890). Of course, *Cox Broadcasting* concerned the disclosure of private facts contained in *public* records, not the disclosure of private facts about private people supplied to the media by informants.

scenarios which prudence counsels our not resolving anticipatorily.

This case is an inappropriate vehicle, especially in its current procedural posture, for this Court to revisit the media's invitation to eviscerate state law privacy protections.

a. **The California Rule Does Not Compel Self-Censorship.**

Petitioners misstate the question presented here in this section of their Petition. Respondents do not deny that a certain amount of breathing space for error in reporting on public figures and public issues is granted by the First Amendment and this Court's decisions. What Respondents argue is that this Complaint adequately alleges that the breathing space was exhausted by the Respondents' outrageous behavior. The Court of Appeal's decision does not restrict any breathing space; it merely holds that the question of its extent is for the jury to decide.

b. **The Right to Privacy is a "State Interest of the Highest Order."**

Petitioners make the strange claim that the public disclosure of intimate private facts about individuals does not trigger an important state interest so long as the facts are true. Petitioners claim that this Court's decisions in *New York Times v. Sullivan*, and its progeny, support their claimed absolute immunity from liability. But this Court's decisions in the area of defamation do not address the issue of a state's interest in preserving intimate

personal information from disclosure. This interest is different from the state's interest in protecting an individual's reputation from defamatory falsehood and is clearly a "state interest of the highest order."

II.

THERE IS NO CONFLICT AMONG CIRCUITS OR STATE SUPREME COURTS WARRANTING THE GRANTING OF THE PETITION

The cases cited by Petitioners do not present the kind of irreconcilable, clear conflict between Federal Circuits and State Supreme Courts and the interim, unpublished decision by the California Court of Appeal in this case that warrants plenary review in this Court. There has been no wholesale abrogation of state privacy laws as they apply to the media. This Court may be required to address this issue in the future but this case is not an appropriate case in which to consider the immunity claimed by the Enquirer.

CONCLUSION

For all of these reasons the Petition should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

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1. The brief in opposition argues:

> "The Court of Appeal's decision does not restrict any breathing space; it merely holds that the question of its extent is for the jury to decide."

Br. Opp. 8. That is exactly the point: the scope of the First Amendment cannot be made to depend on the decisions of particular juries.

2. Respondents suggest that "[a]ny other view is tantamount to abdicating to the editors of the *National Enquirer* on the question of what is newsworthy." Br. Opp. 5. Would that be so strange? Normally in this country

it is editors, not juries, who decide what is news.[1] Moreover, if truthful publication may be restricted at all, that must be only when "overwhelmingly necessary," with judges applying laws "narrowly tailored to a state interest of the highest order." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 537, 541 (1989). California's laws, by empowering juries to use "social value" or "feasible and effective alternatives" to determine the right to publish, do not satisfy that First Amendment standard.

3. Respondents assert that "the precise standards to be applied by a jury have not yet been determined by the California court." Br. Opp. 7. That statement is plainly incorrect. The standards are set forth explicitly in the Court of Appeal's opinion; following California precedents, it ruled exactly what the jury was to decide. Pet. Cert. App. 9a, 13a ("social value"), 27a (whether facts were "unnecessary"). Indeed, the prescribed model California jury instruction reads: "In determining whether the fact made known was newsworthy, you should consider, (1) the social value of the fact published . . . ." COMMITTEE ON STANDARD JURY INSTRUCTIONS, SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 7.21, at 310 (1994).[3]

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[1] "The First Amendment protects the editorial independence of the press." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2464 (1994). "[W]e . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-61 (1976), quoting *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

[2] Respondents elsewhere concede that the court held that "the social value of the facts published" is part of the jury's "newsworthiness" determination under California law. Br. Opp. 6, quoting Pet. Cert. App. 9a.

[3] Respondents excuse this as merely "one of the factors that may be used." Br. Opp. 6. But of course juries may not be allowed to consider improper factors, even if they are also instructed on proper ones. *E.g.*, *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984).

4. Respondents characterize the Court of Appeal's opinion as an "interim" decision. Br. Opp. 4, 9. There is nothing interim about it. "Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court is 'plainly final on the federal issue and is not subject to further review in the state courts.' " *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984), quoting in part *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975); see also *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-80 (1988); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).

5. Respondents imply that the Court of Appeal's ruling was based on the *Enquirer*'s having published the fact of the illegitimate birth. But what the Court of Appeal held was that the publisher could be held liable, in spite of the First Amendment, simply for publishing the exact amounts that Mr. Murphy had paid for support of the child and mother. See Pet. Cert. App. 13a.[4] What respondents allude to as "intimate private facts," Br. Opp. 8, were simply dollar amounts. If this marginal disclosure was not protected by the First Amendment, then under laws like California's much of the press in the United States could be held liable on practically a daily basis. *Cf.* Pet. Cert. 21 n.16.

6. Without any explanation, respondents simply assert that there is no conflict with the decisions of federal courts of appeals and state supreme courts discussed in the petition. Br. Opp. 9. The conflict is stark. See, *e.g.*, *Cinel* v. *Connick*, 15 F.3d 1338 (5th Cir.), *cert. denied*, 115

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[4] "[W]e cannot say as a matter of law that the details of a celebrity's financial support of his child and Ms. Hood's are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy." Pet. Cert. App. 13a.

S. Ct. 189 (1994); *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Star-Telegram, Inc.* v. *Doe*, 1995 WL 341575 (Tex. 1995); Pet. Cert. 18-20.

7. Respondents observe that

> "This Court has not held that states may not allow juries, with proper instructions, to balance an individual's right to the privacy of his or her financial or other intimate financial information against the public's right to information delivered through the press."

Br. Opp. 6. True, this Court has not had occasion so to rule in the precise context of a state privacy statute. But this Court has unequivocally held that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick* v. *Myers*, 461 U.S. 138, 148 n.7 (1983). This Court has held that the First Amendment does not allow the right to publish to turn upon standards with "inherent subjectiveness" that "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988). This Court has rejected under the First Amendment a standard of liability that "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).[5] This Court has held that a standard giving juries discretion over speech "holds a real danger of becoming an instrument for . . . suppression." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971). It is precisely because this Court has not yet applied those principles to this particular context that

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[5] See also *Regan* v. *Time, Inc., supra*, 468 U.S. at 648-49:

> "A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."

California's anomalous privacy laws remain today to burden the press.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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